[redacted]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. 255.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MARGIE GRAY, ADMINISTRATRIX OF KENNETH L. GRAY, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

FILED SEPTEMBER 16, 1912.

(24,167)

(24,567)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 355.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MAGGIE GRAY, ADMINISTRATRIX OF KENNETH L. GRAY, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 13, 1916.

1 The Supreme Court of North Carolina.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
MAGGIE GRAY, Administratrix, Defendant in Error.

Petition for Writ of Error.

Comes now Southern Railway Company, the above named Plaintiff in Error, and says:

That on the 23d day of December, 1914, judgment in this suit was rendered by the Supreme Court of North Carolina which is the highest court in the State in which a decision in the suit could be had, against this defendant therein, and thereafter, to-wit, on the 4th day of Jan'y, 1915, the remittitur from said court was filed in the Superior Court of Randolph County, North Carolina, directing and adjudging that the judgment of said Superior Court be affirmed; whereupon said judgment became final.

In said suit a title, right, privilege, and immunity was duly and specially set up and claimed by your petitioner under the Constitution, and under a statute, of the United States, and the decision of the Supreme Court of North Carolina was against the title, right, privilege, and immunity so set up and claimed, all of which will more fully and in more detail appear in the assignment of errors filed herewith.

Wherefore, and inasmuch as your petitioner feels aggrieved by the final decision of the Supreme Court of North Carolina in rendering judgment against it in this action, it respectfully prays
2 that a writ of error may issue from the Supreme Court of the United States to the Supreme Court of North Carolina for the correcting of the errors complained of and that an order be entered fixing the amount of a supersedeas bond herein.

MANLY, HENDREN & WOMBLE,
Attorneys for Southern Railway Company.

STATE OF NORTH CAROLINA,
Supreme Court, To wit:

Let the writ of error above prayed for issue, upon the execution of a bond by Southern Railway Company, payable to Maggie Gray, Administratrix, in the sum of Nine Thousand Dollars, such bond when approved to act as a supersedeas.

Jan'y 28, 1915.

WALTER CLARK,
Chief Justice of the Supreme Court of North Carolina.

3 The Supreme Court of North Carolina.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
MAGGIE GRAY, Administratrix, Defendant in Error.

Assignment of Errors.

Now comes the above plaintiff in error and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment:

1. The Supreme Court of North Carolina erred in affirming the action of the trial court in declining to submit the second issue as tendered by plaintiff in error, as follows, to-wit:

"Did the plaintiff's intestate, by his own negligence, contribute to his death?"

2. The Supreme Court of North Carolina erred in affirming the action of the trial court in declining to submit the fourth issue as tendered by plaintiff in error, as follows, to-wit:

"In what sum shall the damages sustained by reason of the defendant's negligence be diminished by the contributory negligence of plaintiff's intestate?"

3. The Supreme Court of North Carolina erred in affirming the action of the trial court in permitting the witness, S. W. Jones to testify over the objection of the plaintiff in error, that from a point
38 rail lengths north of the place of the accident, the curve
4 did not interfere with the view of the place of the accident, as pointed out by the witness, J. R. Scruggs.

4. The Supreme Court of North Carolina erred in affirming the action of the trial court in permitting the defendant in error, over the objection of the plaintiff in error, to introduce certain excerpts from plaintiff in error's answer, without introducing the whole of the sentences from which these excerpts were taken, as insisted on by the plaintiff in error, which excerpts were as follows:

"He saw a red lantern and a white lantern on the track ahead, and at once recognized it as a flagman's light * * * Lay down beside the track and went to sleep with his head on or near the cross tie, and in a few minutes thereafter was struck and killed by train No. 37."

5. The Supreme Court of North Carolina erred in affirming the action of the trial court in denying the plaintiff in error's motion at the close of the defendant in error's evidence to dismiss the action as of nonsuit.

6. The Supreme Court of North Carolina erred in affirming the action of the trial court in refusing to allow the plaintiff in error's witness, R. E. Hippert, to testify as to whether, taking into consideration the curve of the track and the other natural objects there, he could have seen the body there beside the track before he did see it.

7. The Supreme Court of North Carolina erred in affirming the action of the trial court in refusing to allow the plaintiff in error's motion renewed at the close of all the evidence for judgment as of nonsuit.

8. The Supreme Court of North Carolina erred in affirming the action of the trial court in refusing to charge the jury, as
5 requested by the plaintiff in error, that upon all the evidence they should answer the first issue "No."

9. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

"When the defendant knows, or by the exercise of ordinary care, ought to know of the defendant's danger, and it is obvious that he cannot extract himself from it, and the defendant fails to do something which it has power to do to avoid the injury; or when the plaintiff is in some position of danger from a threatened contact with some agency under the control of the defendant when the plaintiff cannot and the defendant can prevent the injury, the plaintiff must show that at the same time in view of the entire situation, including the negligence of her intestate, the defendant was thereafter culpably negligent and that such negligence was the latest in succession of causes."

10. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

"It is the duty of an engineer in charge of a moving train to exercise ordinary and reasonable care; that is, such care as a prudent man would exercise under the same or similar circumstances, to keep a vigilant lookout, to use such care to discover persons or objects upon or near the track in front of the advancing train, and to use such care in giving the proper signals or warning of the approaching train."

11. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

"If he sees, or, by the exercise of ordinary and reasonable care, can see, a person on the track in an apparently helpless condition or in such condition so near the track that injury or death to such person may reasonably be apprehended or anticipated by the impact of the train, it is then his duty to use every available means in his power, reasonably consistent with the safety of the train and passengers, to prevent the injury."

12. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

"Did he see, or could he, by keeping a vigilant lookout,
6 in the exercise of reasonable care, have seen the intestate in a perilous situation on or near the track in time to prevent the injury and death?"

13. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

"Could the engineer then have seen the intestate by the exercise of ordinary care, or did he in fact see him in time to avert the injury, and was the intestate at that time in a helpless condition or an apparently perilous situation?"

14. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

"The plaintiff contends that the engineer, by the exercise of reasonable care, could have seen, if in fact he did not see, the intestate in time to have stopped the train and averted the injury, by the use of ordinary and reasonable care."

15. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

"If you find from the evidence, and by its greater weight, that the plaintiff's intestate was asleep on or near the track, and was in a position of peril by reason of threatened impart of the train and apparently insensible of danger, and that the engineer in charge of the approaching train saw or by the exercise of ordinary care, could have seen the perilous situation and could have averted the injury by any available means in his power reasonably consistent with the safety of the train and the passengers, and failed to do so, you will then find that the defendant was negligent."

Wherefore plaintiff in error prays that said decree be reversed and that said Supreme Court of the State of North Carolina be ordered to enter a decree reversing the decision of the lower Court in said Cause.

L. E. JEFFRIES,
MANLY, HENDREN & WOMBLE,
Attorneys for Plaintiff in Error.

7 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Justices of the Supreme Court of the State of North Carolina, Greetings:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Southern Railway Company, Plaintiff in Error, versus Maggie Gray, Administratrix, Defendant in Error, wherein was drawn in question the construction of a clause of the Constitution, and a statute of the United States, and the decision was against title, right, privilege, or immunity specially set up or claimed under such clause of the said Constitution and the said statute; a manifest error hath happened, to the great damage of the said Southern Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court

at Washington, D. C., within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct
8 that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, the 28th day of Jan'y, in the year of our Lord one thousand nine hundred and fifteen.

[Seal United States District Court, Eastern Dist. of N. C., at Raleigh.]

ALEX. L. BLOW,
Clerk District Court of the United States,
Eastern District of North Carolina.

Allowed by:
WALTER CLARK,
Chief Justice Supreme Court of North Carolina.

[Seal of the Supreme Court of the State of North Carolina.]

9 *Return of Writ.*

UNITED STATES OF AMERICA,
Supreme Court of North Carolina, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, together with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of North Carolina, in the City of Raleigh, N. C., this 10 day of February, 1915.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

10 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Maggie Gray, Adm'x, Greetings:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of the State of North Carolina, wherein Southern Railway Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plain-

tiff in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of North Carolina, this 28th day of Jan'y, 1915.

WALTER CLARK,
Chief Justice of the Supreme Court of the State of North Carolina.

[Seal of the Supreme Court of the State of North Carolina.]

Attest:
J. L. SEAWELL,
Clerk of the Supreme Court of the State of North Carolina.

STATE OF NORTH CAROLINA,
County of Randolph:

I, the undersigned attorney of record for the defendant in error in the above entitled cause, hereby acknowledge due service
11 of the above citation.

JOHN A. BARRINGER,
Attorney for Maggie Gray, Adm'x.

12 *Certificate of Lodgment.*

SUPREME COURT,
State of North Carolina, ss:

I, J. L. Seawell, clerk of the said court, do hereby certify that there was lodged with me as such clerk on Jan'y 28 1915, in the matter of Southern Railway Company, Plaintiff in Error versus Maggie Gray, Administratrix, Defendant in Error:

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error, as herein set forth,—one for the defendant, and one for file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office, in Raleigh, North Carolina, this 28 day of Jan'y, 1915.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court of North Carolina.

13 In the Supreme Court of North Carolina.

SOUTHERN RAILWAY COMPANY, Plaintiff in Error,
versus
MAGGIE GRAY, Administratrix, Defendant in Error.

Bond.

Know all men by these presents: That we, Southern Railway Company, a corporation of the State of Virginia, as Principal, and A. B. Andrews, as surety, are held and securely bound unto the above named Maggie Gray, Administratrix, in the sum of Nine thousand dollars to be paid to her for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 28 day of January, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, the above named Southern Railway Company, Plaintiff in error, seeks to prosecute its writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of North Carolina.

Now, therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and virtue.

14 SOUTHERN RAILWAY COMPANY,
By A. B. ANDREWS, *1st Vice-Pres't.*
A. B. ANDREWS.

This bond approved this 28 day of January, A. D., 1915, and to operate as a supersedeas.

[L. S.] WALTER CLARK,
Chief Justice of the Supreme Court of the State of North Carolina.

Filed in Supreme Court North Carolina this 28 Jan'y, 1915.

15 Fifteenth District.

No. 487.

MAGGIE GRAY, Administratrix,
against
RAILROAD COMPANY.

(From Randolph.)

Before Adams, W. J. Plaintiff Appealed.

Be it remembered, that on the 13th day of June, 1913, Maggie Gray, Administratrix, of Kenneth L. Gray, deceased, sued and prosecuted out of the Superior Court of Randolph County, a summons in these words:

Summons.

NORTH CAROLINA,
Randolph County:

In the Superior Court.

MAGGIE GRAY, Administratrix — Kenneth L. Gray, Deceased,
against
SOUTHERN RAILWAY COMPANY.

The State of North Carolina to the Sheriff of Randolph County, Greeting:

You are hereby commanded to summon Southern Railway Company, the defendant above named, if it be found within your county, to be and appear before the judge of our Superior Court, at a court to be held for the county of Randolph, at the Court House in Asheboro, on the seventh Monday before the first Monday of September, 1913, and answer the complaint which will be deposited in
16 the office of the Clerk of the Superior Court of said county within the first three days of said term, and let the said defendant take notice that if it fail to answer the said complaint within the time required by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Herein fail not, and of this summons make due return.

Given under my hand, this 13th day of June, 1913.

(Signed) W. C. HAMMOND,
Clerk Superior Court, Randolph County.

Sheriff's Return.

And on the return day of the said summons, to-wit, on the 14th day of July, 1913, at the Court House in Asheboro, before B. F.

Long, Judge, holding the Superior Court of said county, J. W. Birkhead, sheriff of said county, made the following return on said summons:

Received June 13, 1913. Served June 13, 1913.
By reading and delivering copy of the within summons to G. W. Hilliard, agent of Southern Railroad Company, the within named.

(Signed) J. W. BIRKHEAD,
Sheriff of Randolph County,
By C. W. STEED, *D. S.*

And the following affidavit was filed by the plaintiff.

Affidavit.

NORTH CAROLINA,
Randolph County:

In the Superior Court.

(Title of Cause.)

Maggie Gray being duly sworn says, that she is unable to give the bond or make the deposit in lieu thereof in cash to bring and prosecute the above entitled action for the wrongful killing of her husband as will be set forth in the complaint herein and she
17 therefore asks that she may be allowed to bring and prosecute the said action without giving bond or making the deposit required in lieu thereof.

(Signed) MAGGIE GRAY.

Sworn to and subscribed to before me this the 12th day of June, 1913.

(Signed) W. C. HAMMOND,
Clerk of the Superior Court.

And the following certificate was filed by the attorney for plaintiff.

Certificate.

I, John A. Barringer, a practicing attorney in the State of North Carolina, do hereby certify that I have examined the cause of action of the plaintiff in the above entitled case against the defendant and I believe that the plaintiff has a good and meritorious cause of action, both in law and in fact.

(Signed) JOHN A. BARRINGER,
Attorney at Law.

And the following order allowing plaintiff to sue in forma pauperis was signed:

Order.

Upon reading and considering the above affidavit and certificate, It is ordered by the Court that Maggie Gray, administratrix of Kenneth L. Gray, deceased, be and she is hereby allowed to prosecute the above entitled action against the Southern Railway Company for damages for the wrongful killing of her husband without giving bond or making deposit in lieu thereof.

(Signed) W. C. HAMMOND,
Clerk of the Superior Court.

18 And thereupon the said Maggie Gray, administratrix of Kenneth L. Gray, deceased, by her attorney, John A. Barringer, came and complained as follows:

Complaint.

NORTH CAROLINA,
Randolph County:

In the Superior Court.

(Title of Cause.)

The plaintiff complaining, alleges:

I.

That Kenneth L. Gray died in the State of Virginia on August 30, 1912, and Maggie Gray, his widow, qualified as administratrix of his estate before the Clerk of the Court of Randolph County on the 12th day of June, 1913, and assumed the duties of such office. That the said Kenneth L. Gray left a widow dependent upon him as next of kin.

II.

That at the time of his death the said Kenneth L. Gray was a resident of the County of Randolph in the State of North Carolina, and had property in the said county.

III.

That the defendant is a corporation duly created, organized and existing under the laws of the State of Virginia, as a common carrier, to operate and run trains over railroad tracks with all the privileges and powers of such common carrier, and was the owner of a railroad and was operating the same from Spencer in the State of North Carolina, to Washington, District of Columbia through the State of Virginia.

19 IV.

That at the time of his death the said Kenneth L. Gray was in the employment of the defendant as a brakeman for a valuable considera-

tion, and at such time was in the performance of his duty as such brakeman.

V.

That on the 30th day of August, 1912, the intestate of the plaintiff was on a freight train running from Spencer in the State of North Carolina to Washington, D. C., through the State of Virginia, and when the freight train upon which the intestate of the plaintiff was operating, in going north, arrived at Dry Fork in the State of Virginia, the intestate of the plaintiff was sent forward about three quarters (¾) of a mile to signal a passenger train of the defendant coming South; that the intestate of the plaintiff when he had gotten about three quarters of a mile north of Dry Fork for some reason—loss of sleep, or from some other cause unknown to the plaintiff—laid down by the side of the track of the defendant with his head on the end of the cross-ties and went to sleep; that shortly thereafter passenger train number 37, coming South as aforesaid, carelessly and negligently ran over the intestate of the plaintiff, killing him, whereby the plaintiff was endamaged in the sum hereinafter alleged.

VI.

That the freight train upon which the intestate of the plaintiff was operating and the passenger train which killed the intestate of the plaintiff, were engaged in interstate commerce from Maryland through Virginia, in the State of North Carolina, and the plaintiff alleges that she is entitled to recover by the act of Congress, passed April 22, 1908, (Chapter 149, 35 Statute- at Large, page 65) and that by the amendment thereto passed April 5, 1910, (Chapter 143, Statute- at Large) the defendant cannot remove the case to any court of the United States, this court having obtained jurisdiction for damages for the said wrongful killing of the intestate of the plaintiff [and] pleads the said statute as if fully set out herein.

VII.

That the death of the intestate of the plaintiff was caused without fault on his part, and by the wrongful and negligent act of the defendant, in that although both the engineer and the fireman upon the passenger train which killed the intestate of the plaintiff could have easily seen the intestate of the plaintiff lying in a helpless condition as aforesaid upon the track of the defendant, the track of the defendant being straight a sufficient distance upon which the said passenger train was running toward the intestate of the plaintiff to have stopped the train or slackened its speed sufficiently to have prevented the killing of the intestate of the plaintiff, ran their train on to the plaintiff without ringing its bell, without blowing its whistle, without slacking its speed or without stopping the said train; in that the servants of the defendant did not keep proper lookout on the track in front of the engine and have the engine and train of the defendant in proper control so that they could stop the engine of the defendant in time to have prevented the wrongful killing of the in-

testate of the plaintiff; in that the servants of the defendant did not see the intestate of the plaintiff which it was their duty to do and which they could have done by ordinary care until the train was so near the prostrate form of the intestate of the plaintiff that the servants of the defendant could not stop the train in time to save the life of the intestate of the plaintiff; in that the servants of the defendant wrongfully killed the intestate of the plaintiff upon the said occasion when they had the last clear chance to save his life, which they failed to do by the exercise of ordinary care.

21 VIII.

That it was made the duty of the defendant upon the said occasion to exercise toward the intestate of the plaintiff ordinary care, which it failed to do, and thereby endamaged the plaintiff in the sum of twenty-five thousand ($25,000) dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of twenty-five thousand ($25,000) dollars, and the costs of this action to be taxed by the clerk.

(Signed) JOHN A. BARRINGER,
Attorney for Plaintiff.

Verification.

Maggie Gray, being duly sworn, says that she is the plaintiff in the above entitled action; that she has read the above complaint and knows the contents thereof; that the same is true of her own knowledge, except as to such matters as are therein stated on information and belief, and as to those matters she believes it to be true.

(Signed) MAGGIE GRAY.

Sworn and subscribed to before me, this the 12th day of June, 1913.

(Signed) W. C. HAMMOND,
Clerk of the Superior Court.

Filed June 13, 1913. (Signed) W. C. Hammond, C. S. C.

And the said Southern Railway Company, by its attorneys, Manly, Hendren & Womble, et al., came and pleaded as follows, to-wit:

22 *Answer.*

NORTH CAROLINA,
Randolph County:

In the Superior Court, —— Term, 1913.

(Title of Cause.)

The defendant, the Southern Railway Company, not waiving any of its exceptions heretofore duly noted, reserving each and every of them, makes answers to the complaint as follows:

1. In answer to allegations of Article One, that it is admitted that Kenneth L. Gray, died in the State of Virginia, as alleged, and that Maggie Gray qualified as administratrix of his estate and assumed the duties of such office. That, as to the other allegations thereof, defendant has not knowledge or information sufficient to form a belief and therefore denies the same.

2. That as to the allegations in Article Two thereof, the defendant has not knowledge or information sufficient to form a belief, and therefore denies the same.

3. That the allegations of Article Three thereof are not denied.

4. That the allegations of Article Four are not denied.

5. In answer to allegations of Article Five thereof, defendant says that so much of said article as alleges that plaintiff's intestate was running as brakeman on train from Spencer, N. C., to Monroe, Va.; that at or near Dry Fork, in the State of Virginia, he was sent forward to flag train No. 37, and that he was killed, is true. That all other allegations of said article are denied, except as the same may be hereinafter explained.

6. That in answer to Article Six thereof, it is admitted that the trains referred to in said article of the complaint were engaged in interstate commerce. That so far as the other allegations therein are conclusions of law, the defendant does not deem it necessary to answer.

23 7. That the allegations of Article Seven of the complaint are denied.

8. In answer to Article Eight thereof, that so far as the allegations in said article are conclusions of law, the defendant deems it unnecessary to answer the same, but says that each and every allegation of fact contained therein is denied. It is especially denied that the defendant's engineer and fireman failed to exercise ordinary care for the plaintiff's intestate, and it is denied that plaintiff has been endamaged in the sum of twenty-five thousand dollars or any other sum by the negligence or want of care on the part of the defendant or any of its servants or employees.

For further defense, the defendant says:

9. That, on the morning of August 30, 1912, at about 4 o'clock, extra train No. 1293, going north from Spencer, N. C., to Monroe, Va., was stalled at White Oak Mountain about one mile north of Fall Creek, Va., necessitating doubling this train to Dry Fork, four or five miles north. Conductor Newcomb instructed the engineer, Harrison, to take the first ten cars with brakeman K. L. Gray, plaintiff's intestate, and set them in on siding at Dry Fork, and return with engine for rear portion of train, and for Gray to remain at Dry Fork and hold everything under flag until second section should reach Dry Fork. The first ten cars as aforesaid were carried on to Dry Fork and set in on the siding, and Gray was told by the engineer, Harrison, that No. 37, a through passenger train, southbound, was due to pass Chatham, a distance of — miles north of Dry Fork, in about ten minutes, and for Gray to hold No. 37 until he should come back with the second section of the freight train. That said Gray, plaintiff's intestate, had a white lantern, a red lantern

and a fusee, and told the engineer that he had matches. That said K. L. Gray was an experienced flagman and knew that his duties required of him, under the circumstances, to go northward a distance of eighteen telegraph poles, or one-half mile, place one torpedo on the track, and then on a distance of twenty-seven
24 telegraph poles, or three-quarters of a mile, place two torpedoes ten yards apart on the engineer's side of the track, and then return to point eighteen telegraph poles and take up the one torpedo, and if a passenger train is due within ten minutes he must remain until it arrives; that the said K. L. Gray went up the track northward for about a half mile, lighting his red lantern and his white lantern, and in reckless disregard of the safety of the section of his train, or the lives of its crew, carelessly and negligently failed to put down the torpedoes as he was required to do or to light the fusee in his possession, but instead of performing his duties, recklessly and carelessly placed his lanterns on the track and lay down beside the track with his head on or near the cross-ties, and lying in that position was struck by train No. 37, which passed in a few moments. That the engine of train No. 37 was equipped with electric headlight, burning brightly, and both engine and train had all usual equipment in good condition. That at the point of the accident said train No. 37 was going down grade, and at a speed of about fifty miles an hour; that engineer R. E. Hippert, a skillful and experienced engineer, was in charge; that he was in his place keeping a close lookout, and as he rounded a curve out of a side cut a few yards north of the north switch he saw a red lantern and a white lantern on the track ahead and at once recognized it as a flagman's light; that as soon as he saw the lights he signalled two blasts of his whistle, showing that he had recognized the flagman's signal; that when he approached within about 150 feet of the lanterns, he saw a man lying beside the track with his head on the cross-ties; he immediately applied brakes in emergency and did all in his power to stop his train, but it was impossible to stop the train before passing the point where the man lay. That the train stopped a short distance beyond and he learned that the man was K. L. Gray, plaintiff's intestate, and that he was struck by the train and killed. And the injury and death of the plaintiff's intestate was caused by his
25 own recklessness, negligence, and carelessness as hereinbefore set forth, and he thus contributed to his injury and death.

10. That an extra freight train, on which plaintiff's intestate was brakeman, going from Spencer, N. C., to Monroe, Va., was at the time aforesaid, stalled near Dry Fork, Va., requiring the train to be divided and carried forward in two sections; that the engineer, with plaintiff's intestate, took a train of ten cars north to the siding at Dry Fork, Va., a distance of four or five miles, and put said section of the train in on the said siding, and the engineer in charge told said Gray that No. 37, a southbound through passenger train, having a fast schedule and known as the Southwestern Limited, was due at Chatham, a few miles north, in ten minutes, and to go forward and flag said train No. 37, and hold it until he could bring up the rear section of the freight train; that the engineer went back

for the rear section, but said Gray, an experienced flagman, and well knowing his duties, went forward up the track a distance of about half mile, and instead of regarding the safety of the rear section still on the track further south, and of the lives of its crew, or his own life, recklessly, negligently and carelessly disregarded all the rules of the company required of him, failed to flag No. 37, as required, lay down beside the track and went to sleep with his head on or near the cross-tie, and in a few minutes thereafter was struck and killed by train No. 37, although the engineer in charge was on the lookout, saw a man lying near the track as soon as he could have been seen, and did everything in his power to stop the train and prevent the injury; and plaintiff's intestate by his own carelessness and negligence as aforesaid contributed to his own injury and death.

Wherefore the defendant prays: That the plaintiff take nothing by her action; that the defendant go without day and recover its costs.

MANLY, HENDREN & WOMBLE.
JOHN T. BRITTAIN.

26 NORTH CAROLINA,
Randolph County:

In the Superior Court.

G. W. Hilliard being duly sworn, says:

That he is the depot agent at Asheboro, N. C., of the defendant company; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, save as to matters and things stated on information and belief, and as to those he believes it to be true.

(Signed) G. W. HILLIARD.

Sworn to and subscribed before me, this 3rd day of October, 1913.

(Signed) JOHN M. NEELY,
[NOTARIAL SEAL.] *Notary Public.*

My commission expires December 16, 1913.

Filed October 3, 1913. (Signed) W. C. Hammond, C. S. C.

And thereupon the said Maggie Gray, administratrix of Kenneth L. Gray, deceased, by her attorney, John A. Barringer, came and pleaded as follows:

Amended Complaint.

NORTH CAROLINA,
Randolph County:

In the Superior Court.

(Title of Cause.)

The plaintiff complaining, alleges:

1. That Kenneth L. Gray died in the State of Virginia on August 30, 1912, and Maggie Gray, his widow, qualified as administratrix of his estate before the Clerk of the Court of Randolph County, on the 12th day of June, 1913, and assumed the duties of such office; that the said Kenneth L. Gray left a mother and widow dependent upon him as next of kin.

27 2. That at the time of his death the said Kenneth L. Gray was a resident of the county of Randolph, in the State of North Carolina, and had property in the said county.

3. That the defendant is a corporation duly created, organized and existing under the laws of the State of Virginia as a common carrier, to operate and run trains over railroad tracks, with all the privileges and powers of such common carrier, and was the owner of a railroad and was operating the same from Spencer in the State of North Carolina to Washington, in the District of Columbia, through the State of Virginia.

4. That at the time of his death the said Kenneth L. Gray was in the employment of the defendant as a brakeman for a valuable consideration, and at such time was in the performance of his duty, as such brakeman, and at such time had a mother and wife, his next of kin, dependent on him for support.

5. That on the 30th day of August, 1912, the intestate of the plaintiff was on a freight train running from Spencer in the State of North Carolina to Washington, D. C., through the State of Virginia, and when the freight train upon which the intestate of the plaintiff was operating in going north arrived at Dry Fork, in the State of Virginia, the intestate of the plaintiff was sent forward about three quarters of a mile to signal a passenger train of defendant coming South; that the intestate of the plaintiff when he had gotten about three-quarters of a mile from Dry Fork, for some reason—loss of sleep or for some other cause unknown to the plaintiff—laid down by the side of the track of the defendant with his head on the end of the cross-ties and went to sleep; that shortly thereafter passenger train No. 37, coming south as aforesaid, carelessly and negligently ran over the intestate of the plaintiff, killing him, whereby the plaintiff was endamaged in the sum hereinafter alleged.

6. That the freight train upon which the intestate of the plaintiff was operating, and the passenger train which killed the in-

28 testate of the plaintiff was engaged in interstate commerce from Maryland through Virginia in the State of North Caro-

lina, and the plaintiff alleges that she is entitled to recover by the act of Congress, passed April 22, 1908 (Chapter 149, 35 Statute at Large, page 65), and that by the amendment thereto passed April 5, 1910 (Chapter 143, Statute at Large) the defendant cannot remove this case to any Court of the United States, this Court having obtained jurisdiction for damages for the said wrongful killing of the intestate of the plaintiff [and] pleads the said statute as if fully set out therein.

7. That the death of the intestate of the plaintiff was caused without fault on his part and by the wrongful and negligent act of the defendant, in that both the engineer and the fireman upon the passenger train which killed the intestate of the plaintiff could have easily seen the intestate of the plaintiff lying in a helpless condition as aforesaid upon the track of the defendant, the track of the defendant being straight a sufficient distance upon which the said passenger train was running toward the intestate of the plaintiff to have stopped the train or slackened its speed sufficiently to have prevented the killing of the intestate of the plaintiff, ran their train onto the intestate of the plaintiff without ringing the bell, without blowing its whistle, without slackening its speed or without stopping the said train; in that the servants of the defendant did not keep proper lookout on the track in front of the engine and have the engine and train of the defendant in proper control so that they could stop the engine of the defendant in time to have prevented the wrongful killing of the intestate of the plaintiff; in that the servants of the defendant did not see the intestate of the plaintiff, which it was their duty to do and which they could have done by ordinary care until the train was so near the prostrate form of the intestate of the plaintiff that the servants of the defendant could not stop the train in time to save the life of the intestate of the plaintiff; in that the
29 servants of the defendant wrongfully killed the intestate of the plaintiff upon the said occasion when they had the last clear chance to save his life, which they failed to do by the exercise of ordinary care.

8. That it was made the duty of the defendant upon the said occasion to exercise toward the intestate of the plaintiff ordinary care, which it failed to do and thereby endamaged the plaintiff in the sum of Twenty-five Thousand ($25,000) Dollars.

Wherefore, the plaintiff demands judgment against the defendant in the sum of Twenty-five Thousand ($25,000) Dollars, and the costs of this action to be taxed by the Clerk.

(Signed) JOHN A. BARRINGER,
Attorney for Plaintiff.

Maggie Gray, being duly sworn, says, that she is the plaintiff in the above entitled action; that she has read the above complaint and knows the contents thereof; that the same is true of her own knowledge, except as to such matters as are therein stated on information and belief, and as to those matters she believes it to be true.

(Signed) MAGGIE GRAY.

Subscribed and sworn to before me this the 30th day of December, 1913.

(Signed) R. H. WHARTON,
Dept. C. S. C.

[OFFICIAL SEAL.]

Field December 30, 1913. W. C. Hammond, C. S. C.

And the said Southern Railway, by its attorneys, John T. Brittain, et als., came and pleaded as follows, to-wit:

30 *Answer.*

NORTH CAROLINA,
Randolph County:

In the Superior Court.

(Title of Cause.)

The defendant, the Southern Railway Company, not waiving any of its exceptions heretofore duly noted, reserving each and every of them, and not waiving its former answer in this case, but affirming the same as fully as if here repeated, but answering the amended complaint says:

1. In answer to allegations of Article One; that it is admitted that Kenneth L. Gray died in the State of Virginia, as alleged, and that Maggie Gray qualified as administratrix of his estate and assumed the duties of such office. That as to the other allegations thereof, defendant has not knowledge or information sufficient to form a belief and therefore denies the same.

2. That as to the allegations of Article Two thereof, the defendant has not knowledge or information sufficient to form a belief, and therefore denies the same.

3. That for the purposes of this action, the allegations in article three of the complaint are denied.

4. It is admitted that Kenneth L. Gray was in the employ of the defendant company as a brakeman for a valuable consideration, and that on the occasion, or time referred to, was in the performance of his duty as such brakeman. As to the other allegations in Article Three of the amended complaint, the defendant has not sufficient knowledge or information to form a belief, and therefore denies the same.

5. In answer to allegations of Article Five thereof, defendant says that so much of said article as alleges that plaintiff's intestate was running as brakeman on train from Spencer, N. C., to Monroe, Va.; that at or near Dry Fork, in the State of Virginia, he was sent forward to flag train No. 37, and that he was killed, is true. That all other allegations of said article are denied, except as the
31 same may be hereinafter explained by the defendant in its answer.

6. That in answer to Article Six thereof, it is admitted that the train referred to in said article of the complaint *were* engaged in interstate commerce, that the other allegations therein set out are conclusions of law, and the defendant does not deem it necessary to answer the same.

7. That the allegations of Article Seven of the complaint are denied.

8. In answer to allegations of Article Eight thereof, that so far as the allegations in said article are conclusions of law, the defendant deems it unnecessary to answer the same, but says that each and every allegation of fact contained therein is denied. It is especially denied that the defendant's engineer and fireman failed to exercise ordinary care for the plaintiff's intestate, and it is denied that plaintiff has been endamaged in the sum of Twenty-five Thousand Dollars, or any other sum, by the negligence or want of care on the part of the defendant or any of its servants or employees.

For further defense, the defendant says:

That, on the morning of August 30, 1912, at about 4 o'clock, extra train No. 1293, going north from Spencer, N. C., to Monroe, Va., was stalled at White Oak Mountain, about one mile south of Fall Creek, Va., necessitating doubling this train to Dry Fork, four or five miles north. Conductor Newcombe instructed the engineer, Harrison, to take the first ten cars, with brakeman K. L. Gray, plaintiff's intestate, and set them in on the siding at Dry Fork, and return with engine for rear portion of train, and for Gray to remain at Dry Fork and hold everything under flag until section should reach Dry Fork. The first ten cars as aforesaid were carried on to Dry Fork and set in on the siding, and Gray was told by the engineer, Harrison, that No. 37, a through passenger train, southbound, was due to pass Chatham, a distance of — miles north of Dry Fork, in about ten minutes, and for
32 Gray to hold No. 37 until he should come back with the second section of the freight train. That said Gray, plaintiff's intestate, had a white lantern, a red lantern, and a fusee, and told the engineer that he had matches. That said K. L. Gray was an experienced flagman and knew what his duties required of him, under the circumstances, to go northward a distance of eighteen telegraph poles, or one-half mile, place one torpedo on the track, and then on a distance of twenty-seven telegraph poles or three-quarters of a mile place two torpedoes ten yards apart on the engineer's side of the track and then return to point eighteen telegraph poles and take up the one torpedo, and if a passenger train is due within ten minutes he must remain until it arrives; that the said K. L. Gray went up the track northward for about one-half mile, lighting his red lantern and his white lantern, and in reckless disregard of the safety of the second section of his train, or the lives of its crew, carelessly and negligently failed to put down the torpedoes as he was required to do, or to light the fusee in his possession, but instead of performing his duties, recklessly and carelessly placed his lantern on the track and lay down beside the track with his head on or near the cross-ties, and lying in that position was

struck by train No. 37, which passed in a few minutes. That the engine of said train No. 37 was equipped with electric headlights, burning brightly, and both engine and train had all usual equipment in good condition. That at the point of the accident said train No. 37 was going down grade and at a speed of about fifty miles an hour; that engineer R. E. Hippert, a skillful and experienced engineer, was in charge; that he was in his place keeping a close lookout, and as he rounded a curve out of a side cut, a few yards north of the north switch, he saw a red lantern and a white lantern on the track ahead and at once recognized it as a flagman's light; that as soon as he saw the light he signalled two blasts of his whistle, showing that he had recognized the flagman's signal; that when he approached within about 150 yards of the lanterns,
33 he saw a man lying beside the track with his head on the cross-ties; he immediately applied brakes in emergency and did all in his power to stop his train, but it was impossible to stop the train before passing the point where the man lay. That the train stopped a short distance beyond and he learned that the man was K. L. Gray, plaintiff's intestate, and that he was struck by the train and killed. And the injury and death of the plaintiff's intestate was caused by his own recklessness, negligence and carelessness as hereinbefore set forth, and he thus contributed to his injury and death.

10. That an extra freight train, on which plaintiff's intestate was brakeman, going from Spencer, N. C., to Monroe, Va., was at the time aforesaid, stalled near Dry Fork, Va., requiring the train to be divided and carried forward in two sections; that the engineer, with the plaintiff's intestate, took a train of ten cars north to the siding at Dry Fork, Va., a distance of four or five miles, and put said section of the train in on said siding, and the engineer in charge told said Gray that No. 37, a southbound through passenger train having a fast schedule and known as the Southwestern Limited, was due at Chatham, a few miles north, in ten minutes, and to go forward and flag said train No. 37, and hold it until he could bring up the rear section of the freight train; that the engineer went back from the rear section, but said Gray, an experienced flagman, and well knowing his duties, went forward up the track a distance of about half a mile, and instead of regarding the safety of the rear section still on the track further south, and of the lives of its crew, or his own life, recklessly, negligently and carelessly disregarded all the rules of the company required of him, failed to flag No. 37 as required, lay down beside the track and went to sleep with his head on or near the cross-tie, and in a few minutes thereafter was struck and killed by train No. 37, although the engineer in charge was on the lookout, saw a man lying near the track as soon as he could have been seen, and did everything in his power to
34 stop the train and prevent the injury; and plaintiff's intestate by his own carelessness and negligence as aforesaid contributed to his own injury and death.

Wherefore the defendant prays, that the plaintiff take nothing

by her action; that the defendant go without day and recover its costs.

(Signed) MANLY, HENDREN & WOMBLE,
JOHN T. BRITTAIN,
Attorneys for Defendant.

Verification.

G. W. Hilliard, being duly sworn, says; That he is agent of the defendant company; that he has read the foregoing answer and knows the contents thereof, that the same is true of his own knowledge, save as to matters and things therein stated on information and belief, and as to those he believes it to be true.

(Signed) G. W. HILLIARD.

Sworn to and subscribed before me, this the 12th day of January, 1914.

[NOTARIAL SEAL.] JOHN M. NEELY, *N. P.*

My commission expires December 10, 1915.

Filed the 10th day of January, 1914. (Signed). W. C. Hammond, C. S. C., by W. A. Lovett, Deputy C. S. C.

Minute Docket Entries.

And thereafter, at a regular term of the Superior Court of Randolph County, begun and held on the 20th day of July, 1914, with Honorable W. J. Adams, judge presiding, the following proceedings were had:

Thereupon, this cause coming on for tiral, the following jurors, to-wit:

35 S. E. Henley, E. P. Barnes, Ernest Hughes, C. T. Luck, N. O. Harrison, J. I. Johnson, J. B. Delk, S. S. Cox, W. R. Cagle, Millis Brown, M. F. Skeen, W. H. Gallimore, were chosen, tried, sworn and empaneled to try the issues joined between the parties, and thereupon, after the charge of the Court, said jurors heretofore empaneled in this case for their verdict found the issues submitted to them as follows:

Issues.

NORTH CAROLINA,
Randolph County:

In the Superior Court, July Term, 1914.

(Title of Cause.)

1. Was Kenneth L. Gray, the intestate of the plaintiff, killed by the negligence of the defendant as alleged in the complaint?

Answer. "Yes."

2. What damage, if any, is the plaintiff entitled to recover?

Answer. "(7,500) Seven thousand and five hundred dollars."

There was a motion by the defendant for a new trial and a venire de novo. The motion was refused. Whereupon the Court entered the following judgment:

Judgment.

NORTH CAROLINA,
Randolph County:

In the Superior Court, July Term, 1914.

(Title of Cause.)

This cause coming on to be heard at this term of the court and a jury having been empaneled, who for their verdict find that Kenneth L. Gray, the intestate of the plaintiff was killed by the negligence of the defendant as alleged in the complaint and as-
36 sessed the damages on that account against the defendant in favor of the plaintiff at the sum of $7,500.

It is considered and adjudged by the Court that the plaintiff, Maggie L. Gray, administratrix of Kenneth L. Gray deceased do recover of the defendant, the Southern Railway Company, the sum of $4,500 and the costs of this action to be taxed by the Clerk.

This verdict is reduced from $7,500 to $4,500 without objection or exception on part of plaintiff.

(Signed) W. J. ADAMS,
Judge Presiding.

From the above judgment the defendant appealed to the Supreme Court. Notice of appeal given in open court. Appeal bond fixed at $50 supersedeas bond fixed at $—. Said bonds were duly executed and copies thereof are herewith sent.

Appeal Bond.

NORTH CAROLINA,
Randolph County:

In the Superior Court.

(Title of Cause.)

Whereas, the Southern Railway Company has appealed in the above entitled action, from the judgment of the Superior Court of Randolph County to the Supreme Court of North Carolina, and upon such appeal was required to give bond in the sum of fifty dollars ($50),

Now therefore, know all men by these presents that we, the Southern Railway Company as principal and P. H. Morris as surety, undertake to pay Maggie Gray the sum of fifty dollars ($50.)

In witness whereof, the Southern Railway Company as principal and P. H. Morris as surety, have hereunto set their hands
37 and affixed their seals, this the 24th day of September, 1914.

(Signed) THE SOUTHERN RAILWAY CO., [SEAL.]
By JOHN T. BRITTAIN, *Attorney.*
(Signed) P. H. MORRIS. [SEAL.]

P. H. Morris, being duly sworn, says: That he is worth the sum of two hundred dollars over and above his homestead and personal property exemptions allow- him by law and his debts.

(Signed) P. H. MORRIS.

This the 24th day of September, 1914.

(Signed) J. D. ROSS,
Notary Public.

[NOTARIAL SEAL.]

My commission expires 3/11/1915.

Filed the 24th day of September, 1914. (Signed) W. C. Hammond, C. S. C., by W. A. Lovett, D. C. S. C.

Statement of the case made out by the Honorable W. J. Adams, judge of said court.

Case on Appeal.

NORTH CAROLINA,
Randolph County:

In the Superior Court.

(Title of Cause.)

This was a civil action tried before his Honor, W. J. Adams, judge, and a jury, at the July Term, 1914, of the Superior Court of Randolph County.

In apt time, the defendant tendered the following issues:

1. Was the plaintiff's intestate killed by the negligence of the defendant as alleged?
38 2. Did the plaintiff's intestate by his own negligence contribute to his death?
3. What damage, if any, is the plaintiff entitled to recover?
4. In what sum shall the damages sustained by reason of the defendant's negligence be diminished by the contributory negligence of the plaintiff's intestate?

The Court declined to submit the second issue, as tendered, to-wit: "Did the plaintiff's intestate, by his own negligence, contribute to his death?"

To this action of the Court, the defendant, in apt time, excepted. Exception No. 1.

The Court declined to submit the fourth issues, as tendered, to-wit:

"In what sum shall the damages sustained by reason of the defendant's negligence be diminished by the contributory negligence of the plaintiff's intestate?"

To this action of the Court, the defendant, in apt time, excepted. Exception No. 2.

Plaintiff's Evidence.

MAGGIE GRAY, the plaintiff, being duly sworn, testified:

I was born and bred in Randolph County, and was married to Kenneth L. Gray, September 14, 1910, at Millboro. My husband was killed August 30, 1912. My husband supported me and I was dependent on him for support. I have no property of my own. He was 22 years old. I am 23. The character of my husband as to work was good. He was a sober, industrious man. He was in the
39 employ of the Southern Railroad at the time of his death, and had a run from Spencer to Monroe, Va. The last time before he was killed, he left home about 8 o'clock at night, going north. I think the run paid about $100 a month. He had been in the service of the company from March until he was killed in August. He was a brakeman. I saw his body at his mother's in Randolph County. His head just had a scar on the forehead, and a few places looked like he had been bruised on his face is all that I seen.

Cross-examination:

We had been married about two years at the time of his death. I have no children living, I have one dead. I have been living in Greensboro since the 3rd day of January. I am working in an overall factory. We lived at Greensboro a while before my husband's death. During the month of August, before his death, I had been at my home near Millboro in Randolph County. He had not been on his run that month. He was at home with me the whole month of August. This run on which he was killed was the first he had been on for a month. He was called around 8 o'clock on the evening that he left.

J. R. SCRUGGS, being duly sworn, testified:

I live near Dry Fork, Va., and am tolerable familiar with the railroad north of Dry Fork. I Know the morning that Kenneth Gray was killed. I went up the railroad on the 30th of August north of Dry Fork and I saw blood, and some part of the brains looked like spattered about on the track. I saw evidence of a red and white lantern broken. The glass was in the middle of the track and the brains were lying outside on the ground. I made a measurement north from where the brains and blood and glass were on the track back the other way and I could see the length of 38 rails. A rail is 33 feet I think.

40 Cross-examination:

It was some time after noon that I went to this place. There was nobody there when I got there. I did not know No. 37 by number. I do not know what day of the month it was when I saw the blood and brains and the lantern. It was in August. I won't be certain whether it was two or three years ago. I am not positive as to the day of the month and the day of the week. It was something like ½ a mile north of Dry Fork where I found the blood and brains. Immediately north of this place at which the blood was found, there is a curve around an embankment.

Redirect examination:

The curve is about the end of the 38th rail to the north.

S. W. JONES, being duly sworn, testified:

I live at Dry Fork, Va. I once went with Mr. Suggs north of Dry Fork to where he said he found some blood and brains. I suppose it was half a mile or three-quarters going on north beyond where he pointed out this, up the railroad track; a man coming down toward that place would have a view unobstructed, and could see that point on the railroad track 38 rails 33 feet long. I was right at the mouth of that cut, right on the curve, when I looked there to see. I was standing on the ground. I suppose a man in a cab would be as high again as I am, or possibly higher. I saw the dead body of a man at the depot at Dry Fork on the 30th of August, 1912.

Cross-examination:

It was some time early in the spring of this year that I went with Mr. Scruggs up to the place that I have described. It was more than a year and a half after the accident. That was the time that Mr. Scruggs measured the distance. The distance that I refer to was the distance between the position in which I stood and the place
41 pointed out to me by Scruggs as the place at which he saw the blood. Between those two points there were two curves. The point that you could stand and look that distance was at the point of one curve and this other place was at the point of the reverse curve. I measured from a point on the right hand curve to a point on the left hand curve, forming what I call a reverse curve. The distance that I measured covered a part of two curves. It is a heavy grade. It is down grade from a point about 2 1-4 miles north of Dry Fork on the top of Banister Hill coming south until you cross over Banister trestle not all the way to Dry Fork. White Oak bridge, just north of Dry Fork station, is the bottom of the hill. It is a heavy down grade for 2 1-4 miles to the furthest point north that I described. Soon after you cross over White Oak bridge, you start another climb for two miles or more to the top of White Oak Mountain. White Oak bridge is between Dry Fork station and the place where this accident occurred.

Redirect examination:

Q. Counsel asked you about a curve between where you were standing, 38 rails north of this place, describe what sort of a curve that is?

A. It is a kind of reverse curve: it is not a real large curve.

Q. Does that curve interfere with the view from where you were standing to this place pointed out by Mr. Scruggs?

Defendant objects. Overruled. Exception.
Exception No. 3

A. No, sir.

Plaintiff offered the two following excerpts from paragraph nine of defendant's answer:

"That on the morning of August 30, 1912, at about four o'clock extra train No. 1293, going north from Spencer, N. C., to
42 Monroe, Va., was stalled at White Oak Mountain about one mile north of Fall Creek, Va., necessitating doubling this train to Dry Fork, four or five miles north. Conductor Newcomb instructed the engineer Harrison to take the first ten cars with brakeman K. L. Gray, plaintiff's intestate, and set them in on the siding at Dry Fork and return with his engine for rear portion of the train, and for Gray to remain at Dry Fork and hold everything under flag until the section should reach Dry Fork. The first ten cars as aforesaid were carried on to Dry Fork and set in on the siding, and Gray was told by the engineer Harrison that 37, a through passenger train southbound, was due to pass Chatham, a distance of — miles north of Dry Fork in about ten minutes, and for Gray to hold 37 until he should come back with the second section of the freight train. That said Gray, plaintiff's intestate, had a white lantern, a red lantern, and a fusee, and told the engineer that he had matches. That the said K. L. Gray went up the track northward for about one-half mile, lighting his red lantern and his white lantern. That the train stopped a short distance beyond and he learned that the man was K. L. Gray, plaintiff's intestate, and that he was struck by the train and killed. (He saw a red lantern and a white lantern on the track ahead and at once recognized it as a flagman's light. Lay down beside the track and went to sleep with his head on or near the cross tie, and in a few minutes thereafter was struck and killed by train No. 37.")

The defendant in apt time objected to the introduction of the last two excerpts from its answer and insisted that the whole of the sentence in which these excerpts appear should be head.

Objection overruled and defendant excepted.
Exception No. 4.

It was admitted that the Southern Railway Company is a corporation.

43 B. P. ALLRED, witness for the plaintiff, testified as follows:

I knew Kenneth Gray about all of his life. His character as to industry was good. He was a school teacher, a sober, intelligent man and his habits were good. He was industrious; good health.

J. A. WALKER, being duly sworn, testified:

I knew Kenneth Gray all his life; he was a farmer, going to school, and seemed like he wanted to get an education. He was a good, industrious fellow to work, straight and honest. His health was good.

I. W. ALLRED, being sworn, testified:

Knew Kenneth Gray all his life; he was industrious; was a sober man; he was a very energetic fellow, a good school teacher and a good farmer; was very intelligent.

A. W. Allred.

I knew Kenneth Gray all his life. His habits were good as to soberness, industry and intelligence.

J. W. Routh.

Knew Kenneth Gray all his life; think I know his habits of life; he was what they call a pretty good fellow; never heard any tell of him drinking; he was a sober man and he wanted to go to school and get an education to try to do some business; might be a business man some day. Think he was industrious.

Plaintiff rests.

44 At the close of plaintiff's evidence, defendant moved to dismiss the action as of nonsuit. Motion overruled and defendant excepted.

Exception No. 5.

The Court reserved the motion.

Defendant's Evidence.

D. B. NOLNS, witness for defendant, being duly sworn, testified as follows:

I hold the position of train master with the Southern Railway and have charge of the track from Spencer, N. C. to Monroe, Va. I employ all the brakemen and yard men and promote conductors and engineers. I employed Kenneth Gray as a brakeman. He made his application in 1911. The application bears my signature as a witness to his signature, dated May 30, 1911. After that time I employed him as a brakeman. It was his duty as a flagman, when he was sent ahead of a train, to flag it, to go 18 telegraph poles, put down one torpedo on the engineer's side, go 27 poles, put down two torpedoes 10 yards apart on the engineer's side, and then return to the point where he put the one down and remain until the train arrives. I examined him myself upon the rules of the company in reference to flagging, which is Rule 99, the rule which specifies these requirements, and had him to understand all the different rules and signals that we require a brakeman to have, such

as flagging rules, whistling signals, and the color of the different signals. He was employed as an extra brakeman. Extra brakemen are used when the regular men are off or we have to make up another crew. We always keep anywhere from 10 to 25 extra brakemen to fill in all the time.

A. F. NEWCOMB, being sworn, testified:

I was conductor of extra freight train 1293 leaving Spencer
45 the night of August 29, 1912, from Spencer to Monroe. I was called about 8:30 p. m., and we left Spencer at 9:45. The other members of the crew were the engineer Harrison, Fir-man Idol, front brakeman Gray, and Flagman Terry. I had a through freight train loaded with lumber and other freight that was not perishable. We reached White Oak Mountain south of Dry Fork, Va., about 4:30 a. m. on the morning of the 30th of August, 1912. My train stalled about one mile north of Fall Creek and about 3½ miles south of Dry Fork station. I told my engineer it would be necessary to double. I instructed the front brakeman Gray to take the front end of the train to Dry Fork, put it in the west pass track, cut his engine off, and send the engine back to me, and for him to stay at Dry Fork and hold all trains south until I arrived with the rear end of my train. He then went with the engineer and fireman with the front half of the train. I stayed with the detached portion of my train on White Oak Mountain and when the engine returned I coupled the engine up and proceeded immediately to Dry Fork, the engineer meanwhile having called Flagman Terry in as he was returning to the train. A flagman is called by four long blasts of the whistle from the south and five from the north. I went back to Dry Fork with the rear end of the train headed in the east pass track and as soon as I saw my rear brakeman Terry I signalled my engineer with my hand lantern to call in flagman Gray, or head brakeman Gray, from the north. He immediately called by five long blasts of the whistle. Immediately after the five long blasts of the whistle I saw the headlight of train No. 37 and heard No. 37 blowing the station blow. I saw the head light as it came around on the straight line just beyond the station. The station blow was followed by two short blasts of the whistle, which indicates answering a signal. The two short blasts immediately followed the station blow. The headlight of 37 flashed around to the straight line and 37 came on down there close to White
Oak bridge and stopped. White Oak bridge was half a mile
46 from where my engine was standing. I had my engineer to call my flagman again, thinking the flagman had possibly misunderstood instructions; 37 still stayed there for a while longer, and finally came up to the depot, and the engineer, Mr. Hippert, advised me that he had killed my flagman. I immediately got into communication with the superintendent at Greensboro for instructions, and then went up to where the body was. I found Gray lying with the left side of his face down on the cross tie, kind of doubled up, with his feet drawn up and a hole over his right eye, with some of his brains on his cheek and some brains lying on the

end of the cross tie, about one or two ties from his body. I took the body from off the end of the tie and straightened it off in the pathway. A stone culvert passes under the track about a rail length south of where his body was lying. After I turned his body over and straightened him out, the section master and I think one of his men went up there with me. The body was carried to Dry Fork depot and later sent to Danville. It was about 5:14 a. m., August 30th, when I heard No. 37 blow the station of Dry Fork, and answered the signal. Day was just about beginning to break and the weather was a little foggy. From where I was, on a straight line, I could see the White Oak trestle without the assistance of a light. I could see a very little distance. I saw the reflection of No. 37's head light when it was possible a mile away. My head light was burning at that time. My lantern was also lighted and burning. I know the engine that was pulling No. 37 that morning. With water and coal in its tender, it weighs in the neighborhood of 190 tons. Train No. 37 was composed of ten cars that morning. There were seven steel Pullmans, including a club car and three mail cars. The ordinary steel Pullman car weighs 80 to 90 tons, the mail cars about 60 tons. When I reached the point where the body was lying, the fusee was sticking straight up in the end of a cross tie right at his body. It was intact, the cap had never been broken off, and
47 it had never been lighted. Fusees are used by the railroad company for signals; they burn a red light and are used to protect the rear end of a train or the front end. It is round and about 12 inches long, it has a cap at the top of it, fastened with a tape. It burns ten minutes when ignited. It makes a very brilliant red light. I saw one white lantern down near the body on the end of the tie, possibly three or four feet from the body. I did'nt notice the red lantern.

Cross-examination:

It was about 4:30 when we stalled at White Oak Mountain. I went up to the engineer and told him I wanted him to take the engine and part of the train and go to Dry Fork and put the cars in the siding and then come back with his engine to where we were to get the other cars and pull them up to Dry Fork. He had to go 3½ miles up there and then run into a siding with those cars and then go with his engine up the track and come back on the main line 3½ miles down to where we were, then couple up and pull up again to Dry Fork. I saw the head light of No. 37 as soon as we got in the clear at Dry Fork I saw the reflection against the sky when I was pulling in. I could not tell exactly how far on the other side of White Oak bridge it stopped. I was half a mile from it, and I knew it was just the other side. The head light possibly threw a little of the rays down to where we were. I found this young man with his face turned toward the south, with his brains knocked out, his head was on the sill and he was dead. We gave the flagman a signal calling in Gray, after I got in the side track and the switch locked up at Dry Fork. That was just when I saw the reflection of 37's head light. I called Gray just before I saw the head light. Gray's body was lying about

a rail length the other side of the little culvert, which was
48 possibly two by two. That was about ¼ of a mile I guess beyond White Oak bridge.

Redirect examination:

I carried my lantern when I went up to where Gray's body was. When I got up there, it was breaking day, just about enough to see things without wholly depending on my lantern. At the time we gave the signal calling in Gray, I had not seen 37's head light, but I seen its reflection. In addition to the injury on the right side of him, his right arm was broken; there was nothing to indicate that a wheel had passed over any part of his body.

A. R. HARRISON testified:

I have been an engineer on the Southern Railway Company a little over eleven years and during that time have run practically all the trains that the Southern has. I have run train No. 37 from Monroe to Spencer. I was the engineer who had charge of the engine pulling freight train 1293, leaving Spencer on the night of August 29, 1912. We left Spencer something like 9:45 p. m. The train stalled on White Oak Mountain, 3 or 3½ miles from Dry Fork, Va., and I was unable to pull the train over the mountain. The conductor cut off ten cars and I carried the front portion of the train to Dry Fork and pulled in the west pass track. Kenneth L. Gray was front brakeman on the train. He set the brake on the head of the train, throwed the switch, and let me out on the main line. I told Gray to get his red light and his white light and fusee, I asked him if he had any torpedoes, and he said he did not. I gave him three torpedoes. I told him that 37 was due by Chatham in about ten minutes and to go back plenty far enough to stop him. When he left my engine he had a red lamp, a white lamp, a fusee and three torpedoes. I saw him
light his red lantern after he got off the engine. I saw him
49 going up the track north. I then backed to the top of White Oak Mountain, coupled up my train, pulled in the east pass track to Dry Fork, and as soon as I got a signal from the conductor that we were in the clear, I blew in the flagman from the north. I blew in the flagman by five long blasts of the whistle. I was in my engine, and the first I knew of the approach of 37 was when I saw the light. I did not hear the station blow. It stopped somewhere beyond White Oak bridge, and while 37 was standing there we were discussing and wondering why 37 was standing up there, and I blew in the flagman again and waited a while longer. The body was something like ¼ of a mile north of White Oak trestle. It was close to a little water way that goes under the track. I put Gray off at the north end of the west pass track to go forward and flag 37 between 4:50 and 4:55. I went back to the top of White Oak Mountain and brought my train to Dry Fork and it was somewhere near 5:10 or 5:15 when I arrived at Dry Fork. It was about dark, it was a little foggy, and you could not see without a light.

Cross-examination:

The west pass track is north of Dry Fork station and White Oak trestle is just about 200 yards north of the end of the pass track. It is about ¼ of a mile from White Oak trestle to the culvert. It is the flagman's duty to go back 18 telegraph poles and put down one torpedo and then go back 9 telegraph poles more and put down two torpedoes and return to his first torpedo he put down. The telegraph poles are somewhere between 130 and 140 feet apart.

J. H. IDOL testified:

I was fireman on extra train 1293, leaving Spencer on the night of August 29, 1912. This train stalled on White Oak Mountain about 3½ miles south of Dry Fork. Kenneth L. Gray was front brakeman on the train that night. When the train stalled, we took part of our train and went to Dry Fork; we pulled in the west
50 pass track and Gray left us there. When Gray left the engine, he had a fusee, a red lantern and a white lantern. He had his white lantern lit and lighted the red lantern after he got off the engine. When he started up the track, we started back after our train. We were gone 15 or 20 minutes. When we got back to Dry Fork and pulled in the east pass track, Mr. Harrison, the engineer, gave the signal calling in Flagman Gray. I was on the engine, and the first I knew of No. 37 coming, I saw the head light coming around White Oak trestle just before he stopped.

T. TERRY testified:

I am now conductor on the Southern Railway. I was flagman on train No. 1293 from Spencer to Monroe. Kenneth Gray was front flagman on that train. The train stalled about three miles or probably a little more this side of Dry Fork. When the train stalled I went back to protect the rear of the train. As flagman it was my duty to go back 18 telegraph poles or ½ a mile and place one torpedo on the engineer's side, go back 9 telegraph poles further or ¾ of a mile and place two torpedoes on the engineer's side, return to the one, and stay there until called unless within ten minutes of a passenger train, and if a passenger train is due, stay there and come in on the train. As the engine came back from Dry Fork I was called in and I got on the train and went on to Dry Fork. I heard No. 37 blow the station blow for Dry Fork and just after the station blow I heard 37 answer the signal by two short blasts of the whistle. I was back on the rear of the train and did not see the light from 37 until after it stopped. It was between 5:10 and 5:15 in the morning when 37 blew for the station at Dry Fork. It was not light, day had just started to break, I and the other members of the crew were still using our lanterns. I did not go to the place where Gray's body was.

51 C. M. HUGHES testified:

I have been conductor on the Southern Railway 23 years. I was conductor on train No. 37 on the morning of August 30, 1912. Our train that morning was composed of three mail cars, a club car and

six Pullman sleepers. The Pullman sleeping cars are made entirely of steel and the rest of the cars are steel under-frame, but the body of them is made of wood. At the time, there was no schedule stop for 37 between Lynchburg and Danville. Just south of Chatham, Va., I was in the club car, which was fourth from the engine. The first intimation I had that the train was going to stop, was when I heard the answer to a signal, and felt the brakes go on in emergency. The first thing I did I braced myself for a shock and I kept my seat until he stopped. I heard the station blow for Dry Fork just before he answered the signal and before the brakes went on, all at one time almost. The brakes went on just after he answered the signal. The train stopped with the engine just north of White Oak bridge. I got out and started down to the engine to see what was the matter, and met Engineer Hippert coming back toward the rear of the train. The train stopped at 5:14. I have to keep a record and account for all delays, and the first thing I did was to look at my watch. I made a record of the time the train stopped that night. I had my lantern, it was twilight, a little foggy, it is a low country and swampy. It was just beginning to get light, but you could not see distinctly without a light. It was 5:14 by railroad or eastern time. Mr. Hippert and I then went back behind the train where we found the body of the brakeman. It was not far, but I don't know the distance. I didn't make any estimate of it. He was lying on the outside of the track on the right hand side going south with his head on the tie or right near the tie. He was killed, the brains scattered around. I lifted him up to see whether he was dead or not; he was dead. I didn't see any injuries or marks on his body, except on his
52 forehead. I remember seeing a white lantern a few feet from his body, outside the track; it was not broken. I saw the red globe broken. Mr. Hippert and I went back to the train and pulled on to Dry Fork station, and I found out Mr. Gray's name from the conductor. Just before the brakes went on in emergency, I would say we were running 50 or 60 miles an hour. No. 37 was not scheduled to slacken its speed at Dry Fork.

Cross-examination:

The speed was not limited to 48 miles at that time, that rule went into effect something like a year ago. At Danville I saw some blood or flesh on the iron step leading down from the tender. The step goes down I suppose 12 or 18 inches, and extends from the outside of the rail about 3 or 4 inches.

A. F. NEWCOMB, recalled, testified:

Gray was running as an extra man. He had never been with me before.

R. E. HIPPERT testified:

I was engineer on train No. 37 from Monroe, Va., to Spencer, N. C., on August 30, 1912. We left Monroe about 3:30 a. m. Our train that morning was composed of six sleepers, a club car, three mail cars, engine and tender. My engine was 73 feet from the draw

head on the tank to the pilot. The mail cars cleared 60 feet on the inside, and I should think it would make them at least 65 feet. The Pullman sleepers are about 75 feet long, and the club car is as long as a sleeper. The first schedule stop south of Lynchburg is Danville, and it is 66 miles from Lynchburg to Danville. I had a Pile national electric head light that night, an approved electric head light in use at that time. It was burning bright and in first class
53 condition. The train was equipped with Westinghouse automatic air brakes, and they were in first class condition. We had double brakes on all the sleepers, that is a single brake on each truck and the brakes on all the sleepers have an auxiliary reservoir for each brake. It is 51 miles from Lynchburg to Dry Fork. The track north to Dry Fork for a distance of two miles or more has several curves in it, and its grade is ascending going north, and half a mile of it is a very heavy grade. I should say it rises about 80 feet to the mile. The top of Banister Hill is about 2¼ miles north of Dry Fork. From the top of Banister Hill going south toward Dry Fork, there are several curves in the track, and it is down hill, and the track is in good condition. It is a heavy grade and the bottom of the grade is between White Oak trestle and the north end of the east pass track at Dry Fork. Banister trestle is about a mile and a half north of Dry Fork and as you come off Banister trestle coming south toward Dry Fork, you round a right sharp curve to the right. You strike a straight line there, I should say a little over ⅛ of a mile long, and then you strike another curve to the right. Both of these curves are through a cut. The embankment of the last cut, on the right hand side of the track going south, is about 20 feet high, I should think. After you go around that curve and out of that cut, you strike a little straight run between 500 and 600 feet long, then you strike another slight curve to the left and that curve extends within 200 yards of White Oak bridge. On the morning of August 30, 1912, as I came down Banister Hill from the north, approaching Dry Fork, I was running between 55 and 60 miles an hour, as well as I could judge the speed. I didn't time myself, but a man in that business as long as I have been can judge in the neighborhood of how fast he is running. After I rounded the first curve south of Banister trestle, I struck the little straight line about ⅛ of a mile long, and I blowed the station blow on that straight line, and stopped blowing the station blow just as I approached the curve on
54 the south end of the straight line. As soon as my engine got around the curve in the cut, so I could see beyond the cut, I saw two lanterns, a white lantern sitting on the end of the tie and a red lantern on the rail. I hadn't taken my hand off the whistle cord after blowing the station blow. I immediately answered the flagman's signal by two short blasts of the whistle. About the time I answered the flagman's signal, the rays of my head light came around and struck this little straight piece of track. About the time I had finished answering the flagman's signal I had run within 400 or 500 feet of the flagman's lantern. An electric head light don't revolve, it is straight all the time. As the rays of the head light came around the curve and struck the straight line, I saw something lying

by the side of the track. I was within 400 or 500 feet from it. I hadn't shut the steam off my engine. I was working my engine light down that hill, up to that point, when I saw this object lying beside the track. At the time I saw this object lying beside the track I was running between 55 and 60 miles an hour. I took my hand off the whistle cord and reached for and grabbed the brake valve handle and threw the brakes in emergency, and then reached up and shut the engine off, and I threw my head out of the window—leaned further out of the window than I was—to see if the engine struck this object lying beside the track. When I saw the object I could not distinguish what it was, but seeing the lanterns there I supposed it was the flagman. I leaned clear out of the cab, so I could see down by the side of the engine, as I passed it, and I saw the man laying beside the track. He was lying with his head upon the end of a tie and his feet straight out from the track. I did not see him move before my engine reached him. There was nothing else I could have done after I saw the object lying there to stop my train before I got to him. The front of my engine stopped within about one or two rails length of White Oak trestle. I don't know the exact
55 minute I came around this curve, but when I stopped still, I took my watch out and looked at it, and it was 5:14 a. m. My train was due to pass Dry Fork at 5:10 and if it hadn't been for this accident I would have passed about four minutes late. It was just about twilight. It was dark enough so a man could not see to do anything without a light around on the ground. I could not see any distance ahead of my engine without the head light. Day was just about breaking.

Q. I want you to state, taking into consideration the curve in the track and the other natural objects there, whether you could have seen this body beside the track before you did see it.

(Objection. Sustained. Exception by defendant.)

(The Court being of opinion that it is a question for the jury.)

Exception No. 6.

An engine being straight and the track crooked, the rays of your head light is always straight ahead of the engine, and your light is always straight, and as you round a curve, your light keeps whipping around until you strike the straight line of the track, and then it will show immediately in front of you, but it does not show in front of you until you strike the straight track. At the time of the accident I was sitting at my regular place on the engineer's seat box on the right side of the engine, just back of the boiler head, and as I came around the curve I was looking ahead on the track. When I saw the white lantern and the red lantern, it indicated a flagman, and that there was danger ahead of me. When I see a flag signal it is my duty to answer it by two short blasts of the whistle, and then begin to stop the train. As soon as I answered with two short blasts, I put the brakes in emergency. Ordinarily I would not put them in emergency, but I put them in emergency that morning because I saw something by the side of the
56 track, and thought it was the flagman lying there. I had not run over any torpedoes about ¼ of a mile north of this

point, and I had no warning whatever that I was going to be flagged until I saw the lights on the track. It is a flagman's duty at all times when he is going to flag a train, to go back a distance of 18 telegraph poles or ½ mile and place one torpedo on the track on the engineer's side and then go back 9 poles further, or a distance of ¾ of a mile in all, and place two torpedoes on the track, a rail length apart, and then return to where he has placed the one torpedo, ½ mile from his train, and remain there until called in by the engine whistle on his train, or if there is a passenger or a first class train is due, and come in on the train, but if there is no passenger train due, or he is called in, he takes up this one torpedo and comes on in to his train. I had not run over any torpedoes, and there was not any torpedoes on the track near where I saw the lights. The first thing I did when I stopped, was to get my torch and go down on the ground. I went to my pilot and examined the pilot to see if I had struck the flagman. I didn't see that the engine had hit him, but to satisfy myself, I examined, and I could not find any signs on the engine at all, and I came back to the rear of the engine, and set the torch up on the sill of the tank. About that time the conductor had got down very near to the engine. He had his lamp in his hand and I walked back to the conductor and he asked me what I had stopped for. I walked back to the point where the flagman was lying and saw him lying there dead. He was between 300 and 400 feet from the rear of my train. He was lying with his legs kind of drawed up straight from the edge of the track. He was lying just in the position I first saw him, except his legs were kind of drawed up and his head was knocked off the edge of the tie to the south, just kind of turned his head over. His white lantern was turned over just back of him. There was a little
57 embankment there about four feet high. The frame of his red lantern was lying just on this little embankment and the globe was all shattered on the track, and on the side of the track. He was lying about 30 feet north of the rock culvert. I saw a fusee sticking in the end of the second tie north of his body, sticking in kind of an inclined position. The top of the fusee projected out over the end of the tie, and it never had been lighted, the cap hadn't been taken off the top of it. A fusee like he had makes a brilliant red light. I have been back there since then and examined the premises and made estimates of some of the distances. Coming south around the curve from the first point that you could see the point where he was lying, in the day time, was about 1,000 feet, but from that point 1,000 feet away, my head light on the morning of August 30, 1912, was not throwing any light to the point where he was lying. I don't remember now the exact figures, but it was in the neighborhood of 400 feet I think from the point 1,000 feet away to the point where my light would first fall upon the point where Gray was lying. I had reached the point of the straight line immediately north of where the flagman was lying when my light for the first time fell on the place where Gray was lying. It is between 500 and 600 feet from that point to where he was lying. There is a step on either side of the front

of the tender. The bottom of the step is about 15 inches from the top of the cross tie; it is a box step, 12 inches wide, and at the bottom 6 inches deep, and it tapers up to the tank. It extended within 3 inches of the end of the cross tie. When seated in the cab, from the level of the road bed is about 11 feet. I suppose my head is about 13 feet from the level of the road bed when I am sitting in my cab. I was driving engine No. 1323 that night. I have been driving engines for 16 years, and I have been driving engines pulling fast trains over this part of the road between Monroe, Va., and Spencer, N. C., off and on for 11 years. I have passed over this point north of Dry Fork alm-st daily for 12 years.
58 With that particular train, running at the speed that I was running, at that point, it could, in my opinion, have been stopped, after the brakes were applied, within 2,000 feet. I could have stopped it in about 1,900 feet. The condition of the track there was good. Mr. Nelson went with me to the point of the accident at one time and I pointed out to him the place where Gray's body lay. I was there on one occasion when a photograph was made of this place. The photograph offered in evidence marked "Exhibit A" is the photograph of the place that was made on that occasion, the only change that has been made in the condition as represented in the photograph since the injury took place, is that some new timber has been put in the track, and some ballast, ordinary repairs. The track itself has not been changed in any way, and the picture correctly represents the track at that place.

(At this point the photograph is allowed in evidence. The witness makes a mark to indicate where Gray was lying.)

The furthest curve shown in the picture is the curve I came around when I first saw the light. On the left hand side of the track going south, marked in the picture "E," there is a single line of telegraph poles, and on the right hand side going south, marked in the picture "W," there is a double line of telegraph poles.

Cross-examination:

I said I blew the station blow on the little straight line just south of Banister trestle. Then I came on until I got to the curve. The head light is straight in front of the engine. There is the least little bit of light on each side of the track, but the volume of light goes right straight. The diameter of the glass in front of the light is 18 inches. The light is back in the center about 10 inches. I suppose you could see 10 or 12 feet on each side of the track 100 feet in front of you. I won't say how far on the side you
59 could see, 200 or 300 feet. I don't know whether the head light is made that way so that it will take the curves when you got around or not. The foot of the grade going from Banister Hill is not where you turn around to go on the straight shoot to where the body was lying. I saw the man lying by the track before I got to him. There was blood and flesh on this step that I described. That is where his head struck. I suppose he raised his

head and when he went to get up this step struck him and killed him.

Q. If you had blown your whistle far enough back up that track to have awakened him, he would have gotten up very likely without striking his head on the step wouldn't he?

A. I suppose if I had blown it far enough up the track to have awakened him he would.

Q. If you had blown your signal answer to the flagman when you came into that straight line up there, it is likely he would have gotten up and gotten out of the way?

A. If I had seen his flag any sooner than I did see it I would have answered it sooner. I answered the flagman's signal as soon as I saw it, and I couldn't have seen it any sooner than I did see it.

Q. If you had blown your whistle and had seen him when you came around at that end of the thousand feet that you say was the distance, then he could have gotten up if he had wakened and escaped this injury?

A. I did blow my whistle.

Q. You say you blew it at the beginning at the thousand feet?

A. I answered his signal as soon as I saw it and that was 1,000 feet from the point of the accident.

Q. Didn't you say just now in your examination that when you blew your signal in answer to the flagman you were four or five hundred feet from him?

A. No, sir; I did not. I have been examined once before in this case. When I was asked how far I saw this man on the track, I said about fifty yards off, when I saw his light and distinguished that it was a flag. I said just what is on that paper as a supposition of the distance. I hadn't measured it. When he asked me
60 these questions, I never had taken any measurements at all and it was just a supposition on my part as to distances. I didn't know whether it was fifty yards or one hundred yards, and I said about fifty yards, and that is how he got those questions. I didn't know the actual distances and just supposed it from the speed that I was running. A man is running quite a distance per second at a speed of sixty miles an hour, and you could cover 150 yards in a very short time. I afterwards found out more accurately when I went there with the civil engineer and measured the distance; I went over there to measure it in February. When I gave that deposition I was not as able to distinguish the distance between 150 and 1,000 feet, as I was when I went back there. The rear end of my train when it stopped was about 300 or 400 feet from where the body was lying. Yes, sir; I swore, when they took my deposition that the last coach of the train passed his body about eighty feet, but that was just an estimate. Since it was measured, I saw it was 300 or 400 feet. I was asked in the deposition in what distance I could stop my engine, running fifty-five miles an hour, I said the train stopped between 800 and 1,000 feet beyond the point where Mr. Gray was struck. If I said anything else, that is what I meant in that deposition. I said I supposed you could stop it between 850 and 1,000 feet; that is what I said in that depo-

sition, but my supposition was the distance that I had passed the body after it had been struck, and the distance after measuring it very near backs me up in my statement. I stopped the rear of my train 300 feet the other side of the body. I said I could not see him until my headlight got around on that little straight track.

Exception No. 10.

Q. Then it was a thousand feet from the body to where you first saw it?

A. Yes, sir.

Q. And you stopped within 300 feet the other side of the body?

A. I stopped the rear of my train.

61 Q. Wasn't that 1,300 feet?

A. Yes, sir.

Q. And you swear you couldn't see him until you were coming toward him 350 feet?

A. I said I couldn't see him until my headlight got around on that little straight line.

Q. How far did you say it was?

A. I said it was about 500 feet.

Q. Five hundred feet before you saw anything at all that caused you to undertake to stop, and you stopped between that point and where the man was lying, you had covered 500 feet of the thousand feet?

A. Yes, sir.

Q. Then you had 500 feet to his body?

A. Yes; the front end of the train stopped in about 1,500 feet from the point where the man was lying. I said it was about 500 feet to the body.

Exception No. 11.

Q. You knew what you were doing when you swore you could stop that train in 850 feet to a thousand feet

A. I knew that if I said I could stop it in 850 feet to a thousand feet that I meant that the front of my train had passed the body about that far.

Q. Your answer was positive that you could stop the train, running 55 miles an hour, between 850 and a thousand feet?

A. I might have answered that way.

Q. How far in the night time can you see a red light without having any light, that is in ordinary weather?

A. I suppose a quarter of a mile off.

Q. Then when you turned that curve you ought to have seen this red light sitting on the rail?

A. Yes, sir, I did.

Q. What is a red light for?

A. To flag a train.

Q. Then you knew that that red light was flagging your train?

A. Sure, I did.

Q. And as you said on your examination, you knew there was a flagman there?

A. Yes, the flagman was supposed to be there.

I knew that if I said I could stop it in 800 feet or 1,000 feet
62 I meant that the front of my train had passed the body about that far. When I turned the curve I saw the red light sitting on the rail. I knew it was flagging my train. The flagman was supposed to be there. My electric headlight was a 40-volt light. The emergency brake applies to the whole train. I turned off my power just as I got my hand off the brake valve. I had my power off and emergency brake on when the man was struck.

Redirect examination:

When I first saw the body of Mr. Gray, I was on the straight line.

Exception No. 12.

I saw him after I came on a straight line; I didn't see the body immediately when the engine came around on a straight line, but just as the engine whipped around on a straight line; I was possibly one-half or a third of the distance of the straight line before I saw the body.

When I saw the flagman's signal, he should have been standing on the end of a tie so I could see him, with his lamps, holding his white lantern in his left hand and signalling with his red lantern across the track It was a little foggy at that place. At that time there was a still house at Dry Fork station north of the depot, and the fog, I suppose, was caused from the hot water running down the creek and getting into communication with the cold water. There was a steam engine at the still house. I never saw the deposition that Col. Barringer asked me about after it was written up, and I never did sign it.

H. H. KLINKSCALES testified:

I have been fireman on the Southern Railway since December, 1905. I have been running on fast trains between Monroe and Spencer about three years, and I am familiar with the loca-
63 tion, track and conditions immediately north of Dry Fork, Va. From the top of Banister Hill going south to Dry Fork station, I would say it was 2½ or 2¾ miles. The bottom of the hill is south of where Kenneth Gray was killed. Going south toward Dry Fork, it is a pretty steep grade. On the morning of August 30, Capt. Hippert blew the station blow for Dry Fork, just north of the righthand curve going around through the cut. It was down grade and he was working his engine light, and I had just finished firing and was cleaning my coal up and was in the act of sweeping with my broom. Just about the time he blew the station blow, I was in the act of putting my broom up against the boiler head, and as I heard him blow the station blow, he blew two short blasts of the whistle. As quick as I could, I jumped on my seat box and looked out of the window on the left-hand side, and by the time I got there, the speed that we were running, we were getting near those lights. I saw the light and some object lying beside the track, could not see what it was. We were running very rapidly and by the time I got to my window and looked

out I will say we were about 50 yards from this object and just about the time I saw it we passed it. Capt. Hippert had answered the signal, put on his brake and shut off his engine before I looked out the window. In my opinion, we were running between 55 and 60 miles an hour when Capt. Hippert answered the signal and applied his brakes Capt. Hippert applied all the braking power that possible could be put on the train. When the train stopped, I lit the torches. It was dark at that time. I handed Capt. Hippert's torch to him; he got down and went to the front of the engine; he came back, set his torch up between the engine and tank and went on back and I got the torch and got down on the ground myself, looked back up the train, and saw him and the conductor going back to the rear. I took the torch and looked at the tank step. On the right hand
64 front corner of the step was blood and flesh sticking to it. At the time we stopped there it was pretty dark, the fog was thick, it was just beginning to leave the ground in the morning and very dark. We were standing there some 10 or 15 minutes, I reckon longer than that.

Cross-examination:

Dry Fork was higher than we were; I could see a car standing there, about a distance of 35 car lengths from where I was. I did not see it altogether from the headlight of the engine; that, and day was breaking, with daylight and the headlight I couldn't see the engine plain. A car length is anywhere from 30 to 50 feet.

Exception No. 13.

I would say I was about 50 yards from the body when I first saw it. I stated in my deposition that Mr. Hippert said he saw him in about 15 or 20 yards, and knew it was a man lying there. I don't know how far he could have seen the object and the lantern, but I had an idea he could tell it was a man in 15 or 20 yards. Mr. Hippert told me he could tell it was a man in 15 or 20 yards. I swore in the deposition that Mr. Hippert told me he could tell it was a man 15 or 20 yards. I guess it was 800 or 900 feet from the body when the two signals were blown. I have never been there to measure. The flagman is required to light his fusee on a foggy morning when his light cannot be seen a very far distance. It is also used to leave burning when the flagman leaves.

P. Nelson testified:

I am assistant engineer in the Civil Engineering Department. I went to a place north of Dry Fork on Thursday of this week with Mr. Blair and Mr. Conway. They are residents of the section around dry Fork and not in the employ of the railway company. I
65 knew where the stone culvert is, about 1,500 feet north of White Oak bridge. When we went there we located a point just north of that culvert 32 feet and 2 inches, which is nearly a rail length. Starting with this point, we went north around a curve into the cut, at a point that we could see this point on the track; then we went two rail lengths further to allow for the height the

engineer would be above the road bed, and measured the distance from there back to the point he had first marked on the rail 32 feet, 2 inches north of the culvert. That distance was 1,008 feet. The measurement was made with a 100-foot steel tape. I carried the front end of the tape, Mr. Blair carried the rear, and Mr. Conway checked the measurements. We measured from the beginning of the straight track just south of the right hand culvert, down to the point 32 feet, 2 inches north of the culvert, and found it to be 580 feet. We measured the straight track between those two curves and found it to be 363 feet. We found the distance from the point 32 feet, 2 inches north of the culvert, going south to White Oak bridge 1,533 feet. The culvert is a stone box 3 x 2 feet. I heard the evidence of Mr. Hippert and other witnesses as to the point of the accident and the location of the stone culvert. There is no other stone culvert between the right hand curve and White Oak bridge. On other occasions I have seen broken pieces of a red lamp globe at the point marked by us.

Cross-examination:

I do not know of my own knowledge where the body was. I was there before on Feb. 17, 1913. The 360 feet of straight track is between two curves, one to the right and the other to the left. The 580 feet includes the 360 feet. It is 428 feet from the beginning of the straight track to the furtherest point we measured north.

66 J. H. BLAIR testified:

I am a farmer and live about five miles from Dry Fork. I went with Mr. Nelson to where there is a stone culvert that goes under the railroad track some ¾ of a mile north of Dry Fork. We marked a point 32 feet, 2 inches north of the stone culvert. We used a 100-foot steel tape to measure with. Starting at that point, we went north up the track as far as we could see back to this point where we had marked; then we went back a little further, to allow for the height of the engineer, and measured from there back to this point just north of the culvert. It was 1,008 feet. I carried the rear end of the tape, Mr. Nelson the front end, and Mr. Conway put down the figures. We then measured the length of the straight track, and it was 363 feet. We measured then from the north end of the straight track south to a point where we had started, which included the straight track, and part of the curve south of it, and found that distance to be 580 feet. We then measured from the point we had just marked, to White Oak bridge, and found that to be 1,533 feet. I have been familiar with the location of the track along that point ever since the road was built, and there has been no change in the location of the track more than possibly new ties or ballast put in and the track raised a little.

W. H. Conway.

I am a farmer and live at Lima, Va. I went to Dry Fork with Mr. Blair and Mr. Nelson last Thursday morning. I have been

along that track lots of times before. When we got there Mr. Nelson marked a point 32 feet 2 inches north of the stone culvert. Taking that point as a basis, we measured from there up through the cut and went as far as we could see back to the place where it was supposed this man was killed. After we got back as far as we could see, we went back one or two rail lengths to allow for the height
67 of the engineer. I think it was 1,008 feet. We measured from the beginning of the straight track to the point that we had first marked, 32 feet 2 inches north of the culvert, and it was 580 feet. We measured the straight track and it was 363 feet. The straight track was included in the 580 feet. The distance from the point we first marked, to White Oak bridge was 1,533 feet. The bank in the cut on the right hand side of the track going south was from 16 to 20 feet high.

W. A. Dalton.

I have been section foreman for six years on the section extending from two miles north of Dry Fork to two miles south. It is about a mile and a half or may be a little more from the top of Banister Hill to White Oak bridge, and is a heavy grade. The bottom of the grade is around that curve just south of the culvert where the body was found. I live 30 or 40 steps from the depot at Dry Fork. I remember the morning that this young man, Gray, was killed. Mr. Newcomb, the conductor on the freight train, called me, and I went with him down to the place where the man was killed. No. 37 had gone when I got up. Going north from Dry Fork station, you come first to White Oak bridge, then going north from there you come to this stone culvert, and we found the body lying something like 30 feet north of this culvert. It was lying right close to the end of the ties, with his feet out on the enbankment . I saw a lantern frame and som red glass that had been broken. We brought the body to the station, and shipped it to Danville on the first train going south. The body was on a curve; it was 6 or 8 rail lengths from that point up to where the straight track begins. The straight track up to the next curve is about 10 or 11 rails. The bank on the right hand side of the cut going south is about 20 feet high, and would obstruct the view of the engineer sitting in his seat. He could not see over the top of it.

68 *W. N. Berry.*

I am timekeeper in the superintendent's office at Greensboro, for the Danville Division. Our records show that during the month of August, 1912, Kenneth Gray made $2.98; during the month of July, 1912, he made $94.80; during June, 1912, he made $48.06; during May, 1912, he made $45.26; during April, 1912, he made $49.99; in March, 1912, he made $18.59.

A. R. Rowzie.

I have been a locomotive engineer 26 years, and for the last 12 years have ben running fast passenger trains between Spencer, N. C., and Monroe, Va. I was familiar with the condition of the track immediately north of Dry Fork in August, 1912, and know engine No. 1323 that Mr. Hippert was driving on the morning of August 30, 1912. I am also familiar with the cars that composed train No. 37 on that day, and if the jury should find from the evidence, that engine No. 1323 with three mail cars, a club car and six steel Pullman sleeping cars was going south, down Banister Hill, towards Dry Fork, with air brakes working in good condition, running at a speed of from 55 to 60 miles an hour and the brakes were applied in emergency at the end of the right hand curve, coming out of the curve north of Dry Fork, I have an opinion satisfactory to myself, within what distance the train could be stopped. In my opinion, it could be stopped within 2,000 feet. I am familiar with the character and weight of the cars composing the train that was being driven by Mr. Harrison on the morning of August 30th. It was a heavy grade going down from the top of Banister Hill toward Dry Fork. I would say it is about 50 or 60 feet to the mile. The bottom of the grade going south is south of White Oak trestle. In August, 1912, the track through there was very good. The electric headlight on one of these engines is a regular arc light, two carbons fixed in a re-
69 flector and the reflector is set back in what we call the headlight house a small house in front of the smoke stack. The ray of light goes, I would say 300 or 400 yards, right down the track. There is what is called a field light that throws the light down the track, but the main rays are in front all the while. In going around a curve, the light is straight in front of you, and as you go around the curve it does not come on the track until you get on the straight track again. Going around a curve at night, you can't see on the track very far, possibly 50 feet. The focus or direct rays of your light are thrown straight ahead on your track to a distance of, I suppose, 500 feet. I do not mean you can distinguish an object that far. With the use of one of these electric headlights, I would say a man standing on a track could be distinguished, on a clear night, a distance of 400 to 450 feet. You can see objects on the track further than that. It is easier to see a man standing up on the track than it is lying down.

Cross-examination:

It is about 18 inches across the face of the headlight and about 8 inches deep. I have never observed the grade north of the culvert off of an engine, but I have gone along there with an engine running at a slow rate of speed.

Redirect examination:

When I am in an engine pulling a train I can tell whether I am on a level or going down grade or up grade.

A. R. Harrison.

I am an engineer and have been driving engines 11 years. I am familiar with engine 1323 that Mr. Hippert was driving on August 30, 1912. I saw the engine and train at Dry Fork that morning. I am familiar with the size and weight of the cars that were attached to that engine. In my opinion, if the jury should find from
70 the evidence that Mr. Hippert was driving, on the morning of August 30, 1912, with three mail cars, a club car and six Pullman sleeping cars, running at a speed of 55 or 60 miles an hour, with the brakes all working in good condition, and the brakes were thrown in emergency at the end of the right hand curve going out of the cut, and at the beginning of the little stretch of straight track, the train could not be stopped on that grade in less than 1,900 or 2,000 feet. The electric headlight is set on the front of the engine in a box kown as the headlight house. The glass in that house is something like 18 inches across with a disk reflector about 10 inches deep, and the reflection of that headlight is focussed straight ahead. There is what is known as a field light or a reflex light from that direct ray, which dosen't amount — but very little. It does not give light for the engineer at all. Going around a curve, the light is directly in front of the engine. Going around a right hand curve your light would be thrown to the left, and as the engine rounds the curve it would come around in a direct line with the engine. This glare would possibly make a light that you could see in front of the engine on the rail, ahead of you, possibly 50 feet. Other than that, you cannot see the track ahead of you at night.

J. M. Steadman.

I have been an engineer for 28½ years. I was on the run from Spencer, N. C., to Monroe, Va., 16 or 18 years, and have run all kinds of trains. I have driven engine 1323 and know it mighty well. I have pulled train No. 37 with it, and am familiar with the location and condition of the track immediately north of Dry Fork, Va., and know the location of the right hand curve going through the cut above Dry Fork. The grade from the top of Banister Hill going south to Dry Fork is pretty heavy most of the way. The bottom of the hill is south of the culvert, between White Oak bridge and the culvert. The grade going around the right hand
71 curve through the cut is pretty heavy. From there on down to the culvert it lightens up some. If engine No. 1323 with three mail cars, a club car and six Pullman sleeping cars was going around that right hand curve, running at a speed of from 55 to 60 miles and hour, with the brakes all working in good condition, and the brakes were thrown in emergency, at the point where the curve ends and the short stretch of straight track begins, in my opinion, it would require fully 1,900 or 2,000 feet to stop.

Plaintiff's Evidence in Rebuttal.

Plaintiff offered Blum's Almanac, showing that on August 30, 1912, the sun rose at 5:34.

Plaintiff introduced the mortuary tables.

The plaintiff rests.

At the close of all the evidence, the defendant renewed its motion to dismiss the action as in case of nonsuit.

Motion overruled and defendant excepted.

Exception No. 7.

In apt time, and in writing, the defendant prayed the Court to instruct the jury as follows:

"That upon all the evidence the jury will answer the first issue 'No.'"

The Court declined to give this instruction, and the defendant excepted.

Exception No. 8.

Judge's Charge to Jury.

Gentlemen of the Jury: During this somewhat protracted trial you have heard with patience the testimony of the witnesses and the argument of counsel. It now becomes my duty to submit for your consideration such principles of law as may be deemed to be applicable to the evidence and to analyze the evidence some-
72 what relating to the contention of the plaintiff and the defendant. It is my duty and it is yours to approach a consideration of these subjects with absolute impartiality and freedom from bias or feeling or prejudice or sympathy. The issues which are submitted are to be determined entirely by the evidence and the law. You have no right to decide the issues from mere impulse or preference, but the law requires that you shall find the facts from the evidence and to your finding of the facts apply the law and then say whether the plaintiff is entitled to recover.

The plaintiff as administratrix of Kenneth Gray has brought this suit against the defendant to recover damages for the alleged wrongful death of her intestate. She alleges that his death was caused by the negligence of the defendant. The defendant admits that the intestate's death was caused by the defendant's train; it denies negligence, and pleads contributory negligence on the part of the deceased.

Several years ago the General Assembly of North Carolina enacted a statute which is now Section 59 of the Revisal. I shall read it for a purpose. This section provides that "whenever the death of a person is caused by a wrongful act, neglect or default of another, such as would, if injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable and his or their executors, administrators, collectors or successors shall be liable to an action for damage, to be

brought within one year after such death by the executor, administrator or collector of the decedent." The action which we are now trying is now brought upon this statute. I emphasize this proposition because I shall hereafter refer to other matters in order to draw the distinction between a trial under the state law and a trial under the law upon which we are now proceeding.

In 1908 the Congress of the United States enacted a series of statutes which are known as the Federal Employers' Liability Act.

These statutes were amended in the year 1910. This action
73 is tried under the Federal law. It becomes necessary then
that you understand something of the provisions of these statutes because in material respects they are entirely different from the statute which I have just read.

Section one of the Federal law provides "that every common carrier by railroad while engaged in commerce between any of the several states or territories, or, between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

It is admitted that the defendant was engaged in interstate commerce and that the intestate was employed by the defendant in such commerce at the time of the alleged injury and death. The Federal law of 1908 was amended in the year of 1910. The amendment, among other things, provides that the jurisdiction of the courts of the United States, under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States. The Supreme Court of the United States has held that the laws of the United States are laws in the several states and just as much binding on the citizens and courts thereof as the state laws are. The United States is not a foreign territory and not a foreign sovereignty as regards the

several states, but is a concurrent and within its jurisdiction
74 a paramount sovereignty. The fact that a state court derives
its existence and functions from the state laws is no reason why it should not afford relief, because it is subject also to the laws of the United States and is just as much bound to recognize these as operative within the state as to recognize the state laws. The two together form one system of jurisprudence which constitutes the law of the land for the State, and the courts of the two jurisdictions are not foreign to each other nor to be treated by each other as such but as courts of the same country having jurisdiction partly

concurrent. That court has also held that the liability of an interstate railway carrier for personal injuries resulting in the death of a servant while employed in interstate commerce is measured by the Federal Employers' Liability Act which supersedes all state laws. If then an action is brought in a State court of competent jurisdiction against a common carrier by railroads engaged in commerce between any of the several states by the personal representative of a decedent to recover damages for his death alleged to have been wrongfully caused while he was employed by such carrier in such commerce, the cause must be tried under the Federal act and not under the State law.

For this reason the controversy between the plaintiff and the defendant must be determined under provisions of the Federal act. Where a suit is brought under the State law for alleged wrongful death and contributory negligence is pleaded, it is necessary to submit an issue as to contributory negligence because, nothing else appearing, contributory negligence is a bar to recovery. Under the Federal act, however, contributory negligence does not bar a recovery and it is not necessary to submit such issue, not because evidence of contributory negligence shall not be considered by the jury, but for the reason that it may be considered under the issue as to damages.

The parties having admitted that the defendant and plaintiff's intestate sustained the relation of master and servant and
75 were engaged in interstate commerce at the time of the alleged death, only two issues are submitted to the jury: "1st. Was Kenneth L. Gray, the intestate of the plaintiff, killed by the negligence of the defendant as alleged in the complaint? 2nd. What damage, if any, is the plaintiff entitled to recover?"

Each of these issues, gentlemen, as already indicated, will be answered under the charge of the Court according to your finding of the facts upon the evidence. You will first consider then the issue relating to the question of negligence. Was Kenneth L. Gray, the intestate of the plaintiff, killed by the negligence of the defendant as alleged in the complaint? The defendant admits that the intestate's death was caused by its train, but it denies that his death was caused negligently. The mere fact that the defendant has admitted that its train killed the intestate does not raise a presumption of the defendant's negligence. Notwithstanding this admission, the burden still rests upon the plaintiff to satisfy the jury by the preponderance of the evidence that the defendant's negligence was the proximate cause of his death. In other words, the burden of the first issue is upon the plaintiff; the plaintiff being required to satisfy the jury by her greater weight of the evidence that her intestate's death was caused by the negligence of the defendant as alleged in the complaint. If you so find upon a consideration of all the evidence, your answer to the first issue will be "Yes." If you do not so find, you will answer it "No."

Now, what is negligence and what is proximate cause? Negligence is defined as an improper disregard on the part of one for the safety of the person or property *or person* of another and implies a blame-

worthy antecedent inadvertance to possible harm. It is the failure to observe -or the protection of the interest of another that degree of care which the circumstances justly demand whereby such other person is injured or suffers injury. Actionable negligence includes three elements which *as* essential to its existence. First, the
76 existence of a duty on the part of the defendant to protect the plaintiff from injury; second, the failure of the defendant to perform that duty; third, injury to the plaintiff from such failure of the defendant. Proximate cause is such a cause as operates to produce particular consequences without the intervention of any independent unforeseen cause, without which the injury would not have occurred. Or, to state the definition differently, the proximate cause of an event is defined to be that which in its natural and continuous sequence, unbroken by any new, independent cause, produces the event and without which it would not have happened.

There has been some apparent difference of opinions as to the exact allegations of negligence in the complaint and the exact allegations set up in the answer, and for the purpose of directing your attention specifically to the allegations in the complaint and to the denials and allegations in the answer, I shall read one or two paragraphs for this purpose. (Paragraphs 7 and 9 of the complaint, and the further defense read.)

These, gentlemen, are merely certain of the allegations in the pleadings, and, of course, you will understand that they are not evidence. They have been read merely for the purpose of clarifying the contentions of the parties with respect to the question of the defendant's alleged negligence.

The plaintiff's intestate, through her counsel, has admitted that her intestate was guilty of contributory negligence in that he lay down upon or near the track and went to sleep, but she alleges that the engineer in charge of Train No. 37 had the last clear chance to save his life; that is, that the engineer saw or by the exercise of reasonable care could have seen the deceased in time to stop the train or slow down the speed and thereby could have saved his life, and that he did not exercise such care. This is denied by the defendant. Now what is meant by the last clear chance? The doctrine of the last clear chance presupposes contributory negligence.

77 Exception No. 9.

(When the defendant knows or by the exercise of ordinary care ought to know of the decedent's danger and it is obvious that he cannot extract himself from it, and the defendant fails to do something which it has power to do to avoid the injury; or when the plaintiff is in some position of danger from a threatened contact with some agency under the control of the defendant when the plaintiff cannot and the defendant can prevent the injury, the plaintiff must show that at the same time in view of the entire situation, including the negligence of her intestate, the defendant was thereafter culpably negligent and that such negligence was the latest in succession of causes.)

Whether the defendant was thereafter culpably negligent is de-

pendent upon other questions. First: What was the engineer's duty when the train approached the place of the injury? Second. Did he fail to perform his duty? Third, If so, was such failure the proximate cause of the death?

Exception No. 10.

(It is the duty of an engineer in charge of a moving train to exercise ordinary and reasonable care, that is, such care as a prudent man would exercise under the same or similar circumstances to keep a vigilant lookout, to use such care to discover persons or objects upon or near the track in front of the advancing train, and to use such care in giving the proper signals or warning of the approaching train.)

Exception No. 11.

(If he sees, or, by the exercise of ordinary and reasonable care, can see a person on the track in an apparently helpless condition or in such condition so near the track that injury or death to such person may reasonably be apprehended or anticipated by the impact of the train, it is then his duty to use every available means in his power, reasonably consistent with the safety of the train and
78 passengers, to prevent the injury), to slacken the speed if reasonably necessary and to bring the train to a stop if reasonably necessary and if it is practicable, that is, if it can be done consistently with the safety of the train and passengers, in time to avoid the threatened injury.

Did the engineer fail to perform his duty?

Exception No. 12.

(Did he see or could he, by keeping a vigilant lookout in the exercise of reasonable care, have seen the intestate in a perilous situation on or near the track in time to prevent the injury and death?)

Plaintiff contends that he saw or could have seen the perilous situation of the intestate in the exercise of reasonable care, and in the exercise of such care could have stopped the train in time to avert the injury. The defendant contends that it was an impossibility for him to do so; that is, to stop the train in time to prevent the injury, and the death. Defendant contends that the engineer exercised reasonable care under all the circumstances, and that the jury should so find.

It is contended by the plaintiff, among other things, that if the whistle had been sounded far enough back up the track to have awakened the intestate he might have escaped the injury and death. The defendant contends that such duty is not required of the defendant.

The Court charges that the engineer is not required as a matter of law to anticipate that some one may be lying near the track in an apparently helpless condition and for that reason to give warning by sounding the whistle or ringing the bell at any and every place along the railroad. If he gives the warning or the signal which is required by the law and by the rules of the company, he has in that respect discharged his duty.

79 Exception No. 13.

(Could the engineer, then, have seen the intestate by the

exercise of ordinary care, or did he in fact see him in time to avert the injury, and was the intestate at that time in a helpless condition or an apparently perilous situation?)

Plaintiff contends in the first place that the engineer, if in fact he did not see the intestate lying near the track, could have done so by the exercise of reasonable care. She has introduced two witnesses, J. R. Scruggs and S. W. Jones, who testified that sometime after the alleged injury they went to the railroad track and made certain measurements; that the witness Scruggs sometime after the injury found blood and brains at or near the end of one of the cross ties; that afterward he and Jones went back to the railroad and measured from that point in a northerly direction along the roadbed 38 rails, the length of each rail being 33 feet, and that the end of this distance, to-wit, 1,254 feet, the place at which the brains and blood were seen, could be seen from the north, the end of the distance measured by these witnesses. Plaintiff contends then that the intestate could have been [seen] by the engineer in the exercise of ordinary care 1,254 feet north of the place at which the alleged injury occurred. Plaintiff further contends that the train could have been stopped within this distance and therefore that the jury should find that there was negligence on the part of the defendant.

The defendant, replying, says in the first place, that Jones and Scruggs did not measure from the place at which the injury occurred, because the place at which the injury occurred was not pointed out to them by any of the witnesses; but, admitting that the place where Jones found the brains and blood was the place where the injury occurred; that Jones was mistaken in his measurement by about 200, or between 200 and 300 feet. Defendant says
80 again that Jones and Scruggs made this measurement by daylight, and even admitting that the place of injury could have been seen 1254 feet by daylight, this is not a correct test of the measure of the defendant's duty at the time the train passed along immediately preceding the injury. The defendant contends that the injury occurred before daylight; that it was about twilight; that is, the intervening space between the time the injury occurred and daylight; that there had been a fog and was a fog at the time of the alleged injury, and that it was dark enough to require the use of lanterns by the railway employees when they left the train and got down upon the ground to make the examination. The defendant contends that Banister trestle is one and a half miles north of Dry Fork; coming south there is a curve to the right about an eighth of a mile long, and then another curve, both down grade; that both these curves pass through cuts; that after passing through the last cut the road is straight for a short distance and then curves again to the right; that the engineer was 400 or 500 feet from the place of the injury when he saw the object upon the ground; that he could not have seen it farther than this; that there is a turn in the curve; that the light emitted from the headlight is shed directly in front of the train—the engine; that the place of the injury could be seen by daylight only 1,000 feet away; that the train had to go 400 feet farther before there was sufficient light from the headlight thrown

upon the track to enable the engineer to see the object, owing to the curve; that the engineer could not have seen the object; therefore, the defendant contends, until he was within about 600 feet of the place of the injury; that the train was then running at the rate of 55 or 60 miles an hour; that it could not be stopped under 1,900 or 2,000 feet; that as soon as the engineer, turning the curve, saw the red and white lantern, signals were given; that he immediately put on the emergency brakes; that he did everything within his power consistent with the safety of the passengers upon the train, to stop the train, and that it was impossible to stop it until he had
81 passed the place of the alleged injury.

Plaintiff contends, as already stated, that the distance was 1,254 feet; that the intestate might have been seen this distance, and that Hippert testified before the commissioner, when his deposition was taken, that the train could have been stopped in a distance of 800 feet or 1,000 feet. Plaintiff contends, then, that if the intestate could have been *stopped* [seen] in 800 or 1,000 feet, that the engineer, by the exercise of reasonable care, might have stopped the train in time to avoid the injury.

There is a diversity, gentlemen, in the argument of the counsel for the plaintiff and defendant as to the exact testimony of Hippert with regard to this matter. I will, therefore, direct your attention to his testimony on cross examination with respect to what he swore when his deposition was taken before the commissioner. This is his examination, conducted by one of the counsel for the plaintiff during the progress of this trial. I read now from the stenographer's transcript of the evidence. This is the stenographer's transcript of the testimony of Engineer Hippert before you:

"You have been examined once before in this case? I sure have. I asked you if you were not asked this question, and answered it in this way: 'Q. How far do you say you saw this man on the track? A. About 50 yards, I saw him; it was about 50 yards off when I saw his light and distinguished that it was a flag; when I distinguished a light and saw it was a flag, I was about 50 yards from him'; I ask you if you didn't swear that? I said just what is on that paper as a supposition of the distance; I hadn't measured. When he asked me these questions I never had taken any measurements at all, and it was just a supposition on my part as to the distances. I didn't know that it was 50 yards or 100 yards, and I said about 50 yards; that therefore that is why he has got those questions; I didn't know the exact distance, and I just supposed it from the speed that I
82 was running. A man is running quite a distance per second at a speed of 60 miles an hour, and you could cover 150 yards in a very short time. Then another question: 'Did you give that answer that I read to you? Yes, sir. How did you afterwards find out more correctly where you blew your whistle than you knew? I went over there with a civil engineer and measured the distance. How long afterwards did you go there to measure it? In February. Last February you could tell better where you blew your whistle than you could that night when you blew it? I could distinguish the spot nearer. When you gave this deposition wasn't you just as able to

distinguish the difference between 150 feet and a thousand feet as you are when you went back there to change your evidence? No, sir, I was not.' The Court then made the statement, gentlemen, that there was no evidence that the witness had gone back there to change his evidence. 'How far do you say the end of your train was from where the body was lying when you stopped? I say it was about 300 or 400 feet. I ask you if you swore this when they took your deposition: 'Were there any scars on his head? Yes, sir, the right side of his head was all torn open; I wouldn't be positive; I think it was the right side of his head; he was lying partly turned over on his face. Had the last coach of your train passed the body? About 80 feet.' His answer is Yes, sir. I swore that; that was just an estimate. Now you say it was three or four hundred feet from the rear of the train? Yes, sir, since it was measured. In this examination you were asked what distance you could stop your engine, running 55 miles an hour? Yes, sir, I think I was. I asked you if you didn't say you could stop your train, running 55 miles an hour, between 850 and 1,000 feet? I said the train stopped between 800 and 1,000 feet beyond the point that Mr. Gray was struck.

"Now you say that is what you swore in this deposition? If I said anything else that is what I meant in that deposition. I ask you if these questions were not put to you: 'Then you couldn't
83 stop your train in 540 feet? No, sir, not at the rate of speed I was running. Within what distance could you have stopped it? I suppose you could stop it at between 850 and 1,000 feet.' That is what I said in that deposition, but my supposition was the distance that I had passed the body after it had been struck, which the distance after measuring it very near backs me up in my statement. Now you swear you couldn't stop it in less than 2,000 feet? Answer ——. Then it was a thousand feet from the body to where you first saw it? A. Yes, sir. And you stopped within 300 feet the other side of the body? I stopped the rear of my train. Wasn't that 1,300 feet? A. Yes, sir. And you swear you couldn't see him until you were coming toward him 350 feet? I said I couldn't see him until my headlight got around on that little straight line. How far did you say it was? I said it was about 500 feet. Five hundred feet before you saw anything at all that caused you to undertake to stop, and you stopped between that point and where the man was lying, you had covered 500 feet of the thousand feet? Yes, sir. Then you had 500 feet to his body? A. Yes. And the end of your train stopped 300 feet the other side of his body? Yes. That was 800 feet? A. Yes, sir. You did stop in that distance? The rear end of the train; the front end of the train stopped in about 1,500 feet from the point the man was lying. You knew what you were doing when you swore that you could stop that train in 850 feet to a thousand feet? I know that if I said I could stop it in 850 feet or a thousand feet that I meant that the front of my train had passed the body about that far. Your answer was positive that you could stop the train, running 55 miles an hour, between 850 and a thousand feet? I might have answered it that way."

Now, gentlemen, the question for you to determine is what are the facts with respect to these controverted questions.

84 Exception No. 14.

(The plaintiff contends that the engineer, by the exercise of reasonable care could have seen, if in fact did not see, the intestate in time to have stopped the train and averted the injury, by the use of ordinary and reasonable care.)

The defendant on the other hand, contends that the engineer did everything in his power to discover the object; that he looked as soon as there was light enough on the track for him to see anything; that it was impossible for him to discover the object until he was within about 150 feet of it, and that it was impossible for him therefore to have stopped the train in time to avoid the injury. The defendant contends furthermore that the lanterns upon the track did not indicate that the intestate was lying down by the track in an apparently helpless condition, but merely indicated that there was danger farther down the track, and that he immediately answered the signal, that is, seeing the lanterns, and immediately put on the emergency brakes and stopped the train as soon as he could. The defendant contends that the engineer, if the lanterns indicated the presence of a flagman, had a right to assume that the flagman was in the exercise of his faculties and would take care of himself, and that his breach of duty began only from the moment when he either saw the intestate in an apparently helpless condition or by the exercise of ordinary care might have been him.

Now upon these contentions the Court charges as follows:

Exception No. 15.

(If you find from the evidence and by its greater weight that the plaintiff's intestate was asleep on or near the track and was in a position of peril by reason of threatened impact of the train and apparently insensible of danger, and that the engineer in charge of the approaching train saw or by the exercise of ordinary care could have seen the perilous situation and could have averted the injury

85 by any available means in his power reasonably consistent with the safety of the train and the passengers, and failed to do so, you will then find that the defendant was negligent); and if you further find that the train in consequence struck and killed the intestate and that the defendant's negligence was the proximate cause, that is the direct, immediate, dominant cause of his death, you will answer the first issue "Yes." If you do not find these to be the facts, you will answer the issue "No."

If you answer the first issue "No," you need not consider the second. If you answer the first issue "Yes," you will then consider the second, "What damage, if any, is the plaintiff entitled to recover?" The burden is upon the plaintiff to show by the greater weight of the evidence the amount of damages, if any, to which the plaintiff is entitled.

Now, in discussing this issue I direct your attention first to Section 3 of the Federal act to which I have referred. Section 3 provides "that in all actions hereafter brought against any common carrier by railroad under and by virtue of the provisions of this act to re-

cover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence is not a bar to recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." It is therefore necessary to consider in connection with this issue the nature of the damages, if any, which are recoverable, whether the intestate was guilty of contributory negligence, which is admitted, and the extent of his injury; and if so, what the damages are for that reason to be diminished.

Contributory negligence, gentlemen,—and I give you this definition because you are to pass upon the amount of negligence attributable to the employee—is such act or omission on the part of the intestate amounting to a want of ordinary care as, concurring and co-operating with the negligence of the defendant, becomes the direct and proximate cause or occasion of his injury.

86 Plaintiff admits, as already stated, that her intestate was guilty of contributory negligence. Now, the Federal act provides that the defendant, if liable in damages, shall be liable to the personal representative of the deceased for the benefit of the surviving widow or husband and children of the employee, and if none, then of such employee's parents; if none, then to the next of kin dependent upon such employee, for injury or death resulting in whole or in part from the defendant's negligence. Plaintiff, in her complaint, has named as beneficiary, herself, as surviving widow, and the mother of the deceased. There is no evidence that the mother of the deceased is now living, and the plaintiff has admitted through her counsel, that no damages are to be awarded for the benefit of his mother. There is evidence also that she has no living child, so that damages are not to be awarded for the child, which it is admitted is dead. The statute contemplates that the action may be maintained in behalf of the surviving widow upon a reasonable expectation of pecuniary benefit. There is evidence tending to show that the deceased maintained and supported the plaintiff as his wife, and that she had such reasonable expectation of pecuniary benefit from the continuance of his life. If you find from the evidence that she had, the next inquiry is as to the *effect* of the damages recoverable.

Now, gentlemen, you will perhaps see the object of my reading the State statute. This action is not tried under the State statute, and the measure of damages is entirely different under the Federal act from the measure of damages under the State law. I do not think, as I understand the law, that the argument of the last counsel for the plaintiff properly stated the measure of damages, if any, to which the plaintiff is entitled. Under the State law the measure of damages in case of wrongful death, is this: It is the present value of the net pecuniary worth of the deceased, to be ascertained by deducting the cost of his own living expenditures from his gross income, based upon his life expectancy. But that is not the

87 rule here. The damages recoverable under the Federal act are limited to such loss as results to the benficiary; that is,

in this case the surviving widow, on the ground that she has been deprived of a reasonable expectation of pecuniary benefits by the wrongful death of the employee of the defendant, her husband. The damages are such as from the deprivation of the pecuniary benefits which the widow might reasonably have received if the deceased had not died from his injuries. There must appear some reasonable expectation of pecuniary assistance and support of which she has been deprived. Compensation for such loss does not include damages by way of recompense for grief, wounded feelings; it is a pecuniary loss or damage and must be one that can be measured by some standard. The loss of the husband's society and companionship and the grief of the widow are not to be considered by the jury as elements of damages. Here the damage is pecuniary or financial. It has been held, however, that the word pecuniary is not so narrow as to exclude damages for the loss of services of the husband. In this case, then, the measure of damages, as already stated, differs from that of the State law, in that the measure is pecuniary or financial. The question is not how much the husband would have made for himself, but what pecuniary loss the surviving widow has suffered; what is the present value of the pecuniary benefits she might reasonably have expected from the deceased had he not lost his life. That is the question. You are not to find, as seems to have been argued—you are not to find the number of years during which the husband might have maintained and supported his wife and then multiply the number of years by the amount of his probably maintenance and support. That is not the test; but the question is: What is the present value of the pecuniary benefits that would have gone to the wife in case the husband had not been killed?

Now, there is evidence tending to show that the husband
88 was making about one hundred dollars a month. This is the testimony of the plaintiff. There is evidence on the part of the defendant tending to show that for six months, including March and August, 1912, the deceased made only $259.68, or on an average of $43.28 a month. There is evidence tending to show that the deceased was about 22 years old at the time of his death, and that the widow was 21. The mortuary tables which have been introduced in evidence show that for a person 22 years of age there is an expectation that his life will continue 40.9 years; for one 21 years of age 41.5 years. These estimates, gentlemen, are admitted by the courts for the consideration of the jury, but they are not conclusive. These tables made by the insurance companies are based upon averages and have been adopted by the General Assembly merely for the guidance of the jury. They are not conclusive, and you are not bound by them. The object is not to control your finding, but to aid you in finding how long the life of the person of these respective ages would reasonably have continued.

I have read the section of the Federal act referring to contributory negligence. It is necessary now more particularly to direct your attention to the measure of the diminution in damages, in case you find that the plaintiff is entitled to damages, on account

of the contributory negligence. The section that I refer to says that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. This means that the damages shall be diminished in proportion to the amount of the employee's negligence; that is, that the damages shall be diminished by the jury in proportion to the employee's negligence as compared with the combined negligence of himself and the defendant. In other words, the statutory direction that the diminution shall be in proportion to the amount of negligence attributable to such employee means that where the casual negligence, that is the negligence causing the death, is partly attributable to the employee and partly to the carrier, the employee shall
89 not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both, the purpose being to abrogate the common law rule exonerating the carrier from liability in such case, and to substitute a new rule confining the exoneration to a proportional part of the damages corresponding to the amount of negligence attributable to the employee.

Now that is the rule by which damages, if you award damages, are to be diminished by reason of the contributory negligence of the employee.

Now, gentlemen, if you find that the plaintiff is entitled to damages, you are not to undertake to give the equivalent of a human life; you are not to punish the railroad. You are not to allow anything for grief or suffering; but you are to apply the rules which have been stated, and say, after considering all the evidence, what damages, if any, the plaintiff is entitled to recover.

There was a verdict for the plaintiff. Motion to set verdict aside; motion overruled. Motion for a new trial upon errors assigned as herein set forth; motion overruled, and defendant excepted. Judgment was signed for plaintiff as appears of record. Appeal by defendant to the Supreme Court. Notice of appeal waived. Appeal bond fixed at $50. By consent defendant, appellant, allowed 30 days to serve case on appeal; plaintiff, appellee, 30 days thereafter to serve countercase or exceptions.

Assignments of Error.

The defendant respectfully says that his Honor committed error in that:

1. He declined to submit the second issue as tendered by defendant, as follows, to-wit:

90 "Did the plaintiff's intestate, by his own negligence, contribute to his death?"

The defendant excepted, which is its exception No. 1.

2. He declined to submit the fourth issue as tendered by defendant, as follows, to-wit:

"In what sum shall the damages sustained by reason of the defendant's negligence be diminished by the contributory negligence of plaintiff's intestate?"

The defendant excepted, which is its exception No. 2.

3. He permitted the witness, S. W. Jones, to testify, over the objection of the defendant, that from a point 38 rails north of the place of the accident, the curve does not interfere with a view of the place of the accident, as pointed out by Mr. Scruggs.

The defendant excepted, which is its exception No. 3.

4. He permitted the plaintiff, over the objection of the defendant, to introduce certain excerpts from defendant's answer, without introducing the whole of the sentences from which these excerpts were taken, as insisted on by the defendant, which excerpts were as follows:

"He saw a red lantern and a white lantern on the track ahead, and at once recognized it as a flagman's light."

* * * * * * *

"Lay down beside the track and went to sleep with his head on or near the cross tie, and in a few minutes thereafter was struck and killed by train No. 37."

The defendant excepted, which is its exception No. 4.

5. He denied the defendant's motion, at the close of plaintiff's evidence, to dismiss the action as of nonsuit.

The defendant excepted, which is its exception No. 5.

6. He refused to allow the defendant's witness, R. E. Hippert, to testify as to whether, taking into consideration the curve of the track and the other natural objects there, he could have seen the body there beside the track before he did see it.

The defendant excepted, which is its exception No. 6.

91 7. He refused to allow defendant's motion, renewed at the close of all the evidence, for judgment as of nonsuit.

The defendant excepted, which is its exception No. 7.

8. He refused to charge the jury, as requested by the defendant, that upon all the evidence they should answ-r the first issue "No."

The defendant excepted, which is its exception No. 8

9. He charged the jury as follows:

"When the defendant knows, or by the exercise of ordinary care, ought to know of the *defendant's* danger, and it is obvious that he cannot extract himself from it, and the defendant fails to do something which it has power to do to avoid the injury; or when the plaintiff is in some position of danger from a threatened contact with some agency under the control of the defendant when the plaintiff cannot and the defendant can prevent the injury, the plaintiff must show that at the same time in view of the entire situation, including the negligence of her intestate, the defendant was thereafter culpably negligent and that such negligence was the latest in succession of causes."

And the defendant excepted, which is its exception No. 9.

10. He charged the jury as follows:

"It is the duty of an engineer in charge of a moving train to exer-

cise ordinary and reasonable care; that is, such care as a prudent man would exercise under the same or similar circumstances, to keep a vigilant lookout, to use such care to discover persons or objects upon or near the track in front of the advancing train, and to use such care in giving the proper signals or warning of the opproaching train."

And the defendant excepted, which is its exception No. 10.

11. He charged the jury as follows:

"If he sees, or, by the exercise of ordinary and reasonable care, can see, a person on the track in an apparently helpless condition or in such condition so near the track that injury or death to such person may reasonably be apprehended or anticipated by the impact of the train, it is then his duty to use every available means

92 in his power, reasonably consistent with the safety of the train and passengers, to prevent the injury."

And the defendant excepted, which is its exception No. 11.

12. He charged the jury as follows:

"Did he see, or could he, by keeping a vigilant lookout, in the exercise of reasonable care, have seen the intestate in a perilous situation on or near the track in time to prevent the injury and death?"

And the defendant excepted, which is its exception No. 12.

13. He charged the jury as follows:

"Could the engineer then have seen the intestate by the exercise of ordinary care, or did he in fact see him in time to avert the injury, and was the intestate at that time in a helpless condition or an apparently perilous situation?"

The defendant excepted, which is its exception No. 13.

14. He charged the jury as follows:

"The plaintiff contends that the engineer, by the exercise of reasonable care, could have seen, if in fact he did not see, the intestate in time to have stopped the train and averted the injury, by the use of ordinary and reasonable care."

The defendant excepted, which is its exception No. 14.

15. He charged the jury as follows:

"If you find from the evidence, and by its greater weight, that the plaintiff's intestate was asleep on or near the track, and was in a position of peril by reason of threatened impact of the train and apparently insensible of danger, and that the engineer in charge of the approaching train saw or by the exercise of ordinary care, could have seen the perilous situation and could have averted the injury by any available means in his power reasonably consistent with the safety of the train and the passengers, and failed to do so, you will then find that the defendant was negligent."

The defendant excepted, which is its exception No. 15.

93 The errors assigned above are the same errors as appear in the record, numbered from 1 to 15 inclusive.

MANLY, HENDREN & WOMBLE,
JNO. T. BRITTAIN,
Attorneys for Appellant.

Service of the foregoing case on appeal accepted and a copy thereof received, this the 29th day of August, 1914.

JOHN A. BARRINGER,
Attorney for Plaintiff.

The foregoing is the case on appeal as settled by his Honor, W. J. Adams, at Statesville, N. C., on Oct. 20, 1914.
Filed Sep. 9, 1914.

W. C. HAMMOND, *C. S. C.*,
By W. A. LOVETT,
Deputy C. S. C.

Clerk's Certificate.

NORTH CAROLINA,
Randolph County:

(Title of Cause.)

I, W. C. Hammond, Clerk of the Superior Court of Randolph County, State of North Carolina, do hereby certify that the foregoing is — full, true and perfect transcript of the record in a civil action pending in said court, wherein Maggie Gray, administratrix of Kenneth L. Gray, deceased, is plaintiff and Southern Railway Company is defendtant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Asheboro, N. C., on this 6th day of November, 1914.

W. C. HAMMOND,
Clerk of the Superior Court of Randolph County.

94 NORTH CAROLINA,
Randolph County:

In the Superior Court.

(Title of Cause.)

Whereas, the Southern Railway Company has appealed in the above entitled action from the judgment of the Superior Court of Randolph County to the Supreme Court of North Carolina, and upon such appeal was required to give bond in the sum of fifty dollars ($50);

Now therefore, know all men by these presents that we, the Southern Railway Company, as principal, and P. H. Morris, as surety, undertake to pay Maggie Gray the sum of fifty dollars ($50).

The above named bond is upon the conditions that the Southern Railway Company pay the cost of this action, that may be adjudged against it not exceeding the sum of $50.

In witness whereof, the Southern Railway Company as principal

and P. H. Morris as surety, have hereunto set their hands and affixed their seals, this the 24th day of September, 1914.

THE SOUTHERN RAILWAY CO., [SEAL.]
By JOHN T. BRITTAIN, *Attorney.*
P. H. MORRIS. [SEAL.]

P. H. Morris being duly sworn says: That he is worth the sum of two hundred dollars over and above his homestead and personal property exemptions allowed him by law and his debts.

P. H. MORRIS.

Sworn to and subscribed to before me.
This the 24th day of September, 1914.

J. D. RASS,
Notary Public.

My commission expires March 11, 1915.

95 *Docket Entries.*

Appeal docketed November, 9, 1914. Argued November, 26, 1914. Opinion by Clark, Chief Justice, for the Court, and dissenting opinion of Brown, Justice (in which dissenting opinion Walker, Justice, concurred) filed December 23, 1914, as follows:

96 Supreme Court of North Carolina, August Term, 1914.

#487, Randolph.

MAGGIE GRAY, Adm'x of K. L. Gray,
v.
SOUTHERN RAILROAD COMPANY.

Appeal by Defendant from Adams J., at July Term, 1914 of Randolph.

John A. Barringer for plaintiff.
John T. Brittain and Manly, Hendren & Womble for defendant.

CLARK, *C. J.:*

This is an action for the wrongful killing of the plaintiff's intestate, under the U. S. Employers' Liability Act, Ch. 149, 35 Statutes at Large 65, amended Ch. 143, Statutes at Large.

Exceptions 1 and 2 are that issues as to the amount of damages by reason of the negligence of the defendant and of plaintiff's contributory negligence were not submitted to the jury as separate and distinct issues. But the statute does not require this. The Court instructed the jury in accordance with the statute to assess the damages by reason of the death of the intestate, if they found it was due to negligence on the part of the defendant, and to assess the amount of diminution on account of the contributory negligence of the deceased and the difference, if any, would be their verdict.

The death of the intestate occurred in Virginia, but it was admitted that the defendant was engaged in interstate commerce and that the intestate was employed by the defendant in such commerce a the time of his death. The judge read the Federal Act on the subject and carefully explained it to the jury. He told them that it required that the damages "shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. This means that the damages shall be diminished in proportion to the amount of the employee's negligence, as compared with the combined negligence of himself and the defendant * * * . and that where the casual negligence, that is, the negligence causing the death, is partly attributable to the employee and partly to the
97 carrier, the employee shall not recover full damages, but only a proportional amount, bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both, the purpose being to abrogate the common law rule exonerating the carrier from liability in such cases, and to substitute a new rule confining the exoneration to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee."

The Court submitted only the two issues, "whether the intestate of the plaintiff was killed by the negligence of the defendant, as alleged in the complaint," and "what damage, if any, is the plaintiff entitled to recover." But with this instruction the whole matter in dispute was fairly submitted to the jury, and it was not error not to submit separate issues as to how much was assessed by the jury as the total damages and how much was deducted for the contributory negligence. Where the issues submitted fully cover the disputed points, it is not error to refuse to submit other issues. Hendricks v. Ireland, 162 N. C. 523, and cases there cited; R. R. v. Earnest, 229 U. S. 114.

Exception 3 is to the admissibility of the testimony of S. W. Jones, that the curve did not interfere with the view at the point 38 rails north of the place of the accident. The testimony was admissible and the defendant's brief argues merely the weight to be given such testimony, which was a matter for the jury.

Exception 4 is abandoned, as it does not appear in the defendant's brief. Rule 34. Exception 6 was to the refusal to permit the witness, Hippert, to testify whether, taking into consideration the curve of the track and the other natural objects there, he could have seen the body beside the track before he did see it. This would have been an expression of opinion which the jury should have drawn from the facts in evidence, and not the witness. It would be better
98 to admit such evidence, but its admission or rejection can rarely be of sufficient importance to affect the result or justify a new trial.

Exceptions 5, 7 and 8 are to the refusal of the motion to nonsuit and to charge the jury to answer the first issue "No." There was sufficient evidence to go to the jury and these exceptions need not be discussed. On such motion the evidence must be considered in

the most favorable light to the plaintiff. Hodges v. Wilson, 165 N. C. 323; Walters v. Lumber Co., Ib. 388. This is familiar learning.

Exceptions 9, 10, 11, 13, 14 and 15 are to the charge of the Court and rest upon the idea that the defendant owed the intestate no duty whatever until the peril of the deceased was discovered by the engineer. This would destroy the entire doctrine of "the last clear chance" in cases of negligence. This is not the intent of the "Employers' Liability" statute, which is in the interest of the party injured by making contributory negligence, when it exists concurrently with negligence on the part of the defendant, not a complete bar to recovery as heretofore, but only a matter in abatement in proportion to the comparative negligence of the party injured. The common law doctrine of negligence still applies in the construction of the statute, as to the negligence of the defendant. It was the duty of the engineer and fireman to have kept a proper lookout on the track and if they could not do so it was the duty of the defendant to have had still another person on the lookout to prevent any avoidable accident. Arrowood v. R. R., 126 N. C. 269. If the defendant could, by reasonable diligence, have discovered the critical condition of the deceased in time to have averted the injury it is liable, notwithstanding the negligence of the deceased. 3 Labatt M. & S. (2 Ed.) 3390, Note 5; R. R. v. Ives, 144 U. S. 408.

It is not necessary to discuss more fully the facts in the
99 case, as they are fully presented in the careful charge of the court, with the correct application of the law. The distance in which the body of the deceased could have been seen was entirely a question for the jury upon the evidence, as well as the distance within which the train could have been stopped.

The deceased had put his red light in the middle of the track as a danger signal and had gone to sleep lying beside the track with a white light by him. The engineer testified that he knew that this flagman should be there and that these lights were a danger signal; that he did not undertake to slacken his speed till he got within 300 feet or less when he blew the signal and the deceased waking and r-ising up his head was struck by an iron step, which killed him; that if he had blown the signal sooner, the sleeper would probably have gotten up in time to have avoided being struck. There was evidence tending to show that the engineer and fireman were not keeping a proper lookout on the track, if any, until they got within 50 yards of the sleeper. Dallago v. R. R., 165 N. C. 269.

The whole subject is fully discussed in a late case, Draper v. R. R., 161 N. C. 310, in which Allen, J., states the law as follows: "In an action for damages for the negligent killing of plaintiff's intestate, who was down and helpless on the track and was run over by the defendant's train, involving the question whether the engineer, by the exercise of ordinary care, could have stopped the train in time to have avoided the killing, the jury are not bound by the opinions of the witnesses, as to the distance within which the train could be stopped, but may consider the evidence as to the condition of the track, the grade, the length and weight of the train, the speed and

other relevant circumstances and upon the whole evidence determine within what distance it could have been stopped."

It is not sufficient defense of the negligence of the defendant that the engineer could not have stopped the train in time to avoid
100 the death of the plaintiff's intestate after he perceived him on the track. The question is whether the engineer could have stopped the train in time to have avoided the killing the deceased after he could have perceived the danger of the deceased, had the engineer and fireman been in the exercise of proper diligence on the lookout. Ray v. R. R., 141 N. C. 87; Farris v. R. R., 151 N. C. 491; Edge v. R. R., 153 N. C. 216; R. R. v. Ives, 144 U. S. 408.

No error.

101 ; No. 487.

GRAY, Administratrix,
vs.
SOUTHERN RAILWAY.

BROWN, *J.*, dissenting:

I am of opinion that the Court below erred in refusing the defendant's prayer for instruction, and in applying the decisions of this Court instead of following those of the Federal Courts, inasmuch as it is admitted that the action was brought under the Federal Employers' Liability Act. All the evidence tends to prove that plaintiff's intestate, Kenneth L. Gray, was a brakeman on a freight train running between Spencer, N. C., and Munroe, Va. The freight train was stopped and cut in two for shifting purposes. Gray was sent forward to flag No. 37, a fast mail, due to pass in about ten minutes.

It was Gray's duty to go up the track eighteen telegraph poles, place one torpedo on the engineer's side, then go nine telegraph poles further, place two torpedoes on the engineer's side, and then return to the place where he had placed the one torpedo and wait with his lanterss until the train arrived.

Gray did not place any torpedoes on the track, but he went up the track about three quarters of a mile, placed his white lantern on the end of a tie, his red lantern on the rail, and lay down with his head on the end of another tie, with his body on the outside of the track, and went to sleep.

Approaching the point of the accident on the morning of August 30th, No. 37 was four minutes late, and was running 55 to 60 miles an hour. Just before rounding the curve in the cut, the engineer had blown the station blow for Dry Fork station. The engineer was in his seat, keeping a proper lookout ahead, when he emerged
102 from the cut, and while rounding the right hand curve, he saw the lanterns sitting on the track ahead of him. He recognized it as a flagman's signal, and answered the signal with two blasts of the whistle. About the time he had finished answering the signal, he reached the point where the track straightens, his headlight fell upon the track in front of him, and he saw an object lying beside the track that he thought was a man. He was then about 500

feet from the point of the accident. He immediately applied his brakes in emergency, shut off his engine and stopped his train as quickly as he could.

Gray's head, being on the cross tie, came in contact with the step of the tender as it passed, and he was killed. There is not a scintilla of evidence that the Engineer of No. 37 saw Gray, or discovered his condition, in time to stop.

The Court instructed the jury that if the engineer in charge of the approaching train saw, or by the exercise of ordinary care could have seen the perilous situation and could have averted the injury by any available means in his power, reasonably consistent with the safety of the train and the passengers, and failed to do so, then they should find that the defendant was negligent.

In administering the Federal Liability Act, the State Courts are bound by the construction and decisions of the Federal Courts. Since Congress has taken possession of the field of employers' liability to employees in interstate transportation by rail, all State laws upon the subject are superceded.

Seaboard Air Line Ry. Co. vs. Horton, 223 U. S., 402;
Mondou vs. Ry. Co., 223 U. S., 1.

Not only have State statutes been made inapplicable, but the common law as well, where a construction has been placed upon it by the State Courts differing from that of the Federal Courts.

South Covington R. Co. vs. Finan, 153 Ky., 340;
W. U. Tel. Co. vs. Milling Co., 218 U. S., 406.

This subject is elaborately and ably discussed by Mr. Justice Myers of the Supreme Court of Indiana in the recent case of So. Ry. v. Howerton, 105 N. E. Rep., 1026, where all the authorities are collected.

103 Under the law, as applied by the Federal Courts, the defendant is liable if it could have avoided the injury by the exercise of ordinary care, only after actually discovering the perilous situation.

Little Rock R. & E. Co. v. Billings, 173 Fed., 903;
Note 55 L. R. A., page 424;
Coasting Co. vs. Tolman, 139 U. S., 551;
Newport News & M. V. Co. vs. Howe, 52 Fed., 362;
Buckworth vs. Grand Trunk Western Ry. Co., 127 Fed., 307;
N. Y. C. and H. R. vs. Kelly, 93 Fed., 745;
Smith vs. R. R. Co., 210 Fed., 414;

In Newport News & M. V. Co. vs. Howe, Supra, the plaintiff was a brakeman on a freight train; the train parted and the engine with the forward portion of the train ran some distance ahead before the accident was discovered. The conductor on the rear portion of the train sent Howe ahead with a lantern to signal the engine, and to give the engineer information as to the whereabouts of the rear cars. Howe went forward several hundred yards, sat down on the end of a tie, put his light down near him, and went to sleep with his arm thrown over the rail.

The engineer, after running about five miles, discovered the parting, and started back with his engine and tender to take up the rest of the train. The fireman testified that, when within a distance of between 100 and 200 feet from the point where Howe lay, he saw the reflection of the light from Howe's lamp. He called to the engineer: "Look out, there they are," meaning the rear portion of the train.

He looked again and saw on the other side of the track an object which he took to be the brakeman waiting to step on the engine. He crossed to the engineer's side and then saw the prostrate man only 10 or 15 feet from the approaching engine. He signalled the engineer,
who applied the brakes, but was unable to stop before the
104 wheels had passed over Howe's arm and cut it off.

A witness, McGuire, testified that the engineer did not look out of the cab window, and that if he looked out, he would have seen Howe and could have stopped the engine in time to avoid the accident. The rules of the company required the engineer, under these conditions, to signal his return by blowing his whistle at certain intervals, and not to run at a higher speed than four miles per hour. Both of these rules were being violated.

Judge Taft, writing the opinion, says:

"While an engineer who fails to keep a sharp lookout upon the track is wanting in due care to passengers and lawful travellers, because of the probability of d*n*ager to each from such failure, such conduct is not a want of due care with respect to a man asleep on the track, because of the presumption on which the engineer has a right to rely that no one would be so grossly negligent in courting death."

"As applied to as a case like the present, therefore, we believe the rule relied on by the counsel of plaintiff below should be construed to mean that the negligence of the plaintiff will be no defense, if the defendant, after he knew the peril of the plaintiff, did not use due care to avoid it."

This case cites Coasting Co. vs. Tolson, 139 U. S., 551, and referring to that case, Judge Taft says:

"This would seem to show that, in the opinion of the Supreme Court, knowledge of plaintiff's peril was required to make the rule applicable."

In Little Rock R. & E. Co. vs. Billings, supra, the Court composed of Justices Sanborn, Pollock and Van Devanter, the latter of whom is now a justice of the Supreme Court of the United States, said:

"As deduced from the foregoing authorities, and many others that might be cited, this qualification may be stated as follows:
105 A, who by his own negligent act or conduct has placed himself in a position of imminent peril, of which he is either unconscious or from which he is unable to extricate himself if conscious, may not be carelessly, recklessly, or wantonly injured by B, who, after he has discovered and knows the helpless and perilous condition of A, has it within his power to avoid doing him an injury by the exercise of reasonable care and diligence in the use of such instrumentalities as he can command; and the failure to exercise such reasonable care and diligence on the part of B, under such circum-

stances, will constitute actionable negligence, rendering him liable in damages to A, notwithstanding the prior negligent act of A, in placing himself in position to receive the injury."

To my mind, it is quite plain that in charging the jury upon the measure of the engineer's duty, the trial Judge should have followed the Federal and not the State rule.

Testing this case by our own state decisions, notably the unanimous opinion of the court in Holland vs. R. R., 143 N. C., 435, the plaintiff should not be permitted to recover.

Mr. Justice Walker concurs in this dissenting opinion.

106 North Carolina Supreme Court, August Term, 1914.

No. 487, Randolph County.

MAGGIE GRAY, Administratrix,
v.
SOUTHERN RAILWAY COMPANY.

Judgment.

This cause came on to be argued upon the transcript of the record from the Superior Court of Randolph County: upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here, that the opinion of the Court, as delivered by the Honorable Walter Clark, Chief Justice, be certified to the said Superior Court, to the intent that the judgment be affirmed.

And it is considered and adjudged further, that the defendant and surety do pay the costs of the appeal in this Court incurred, to-wit, the sum of Fifteen 65/100 dollars ($15.65), and execution issue therefor.

107 Supreme Court of North Carolinia.

I, J. L. Seawell, Clerk Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the transcript of record in the action lately pending therein entitled Maggie Gray, administratrix, against Southern Railway Company, as appears from original on file in said Court.

Witness my hand and seal of said Court at office in Raleigh this tenth day of February, 1915.

[Seal of the Supreme Court of the State of North Carolina.]

J. L. SEAWELL,
Clerk Supreme Court North Carolina.

Endorsed on cover: File No. 24,567. North Carolina Supreme Court. Term No. 355. Southern Railway Company, plaintiff in error, vs. Maggie Gray, administratrix of Kenneth L. Gray, deceased. Filed February 18th, 1915. File No. 24,567.

2

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1915

No. 355

SOUTHERN RAILWAY COMPANY,
Plaintiff in Error,

vs.

MAGGIE GRAY, Administratrix of KENNETH L. GRAY, Defendant in Error

---

On Writ of Error to the Supreme Court of North Carolina.

BRIEF FOR PLAINTIFF IN ERROR.

L. E. JEFFRIES,
H. O'B. COOPER,
L. L. OLIVER
Counsel for Plaintiff in Error.

NOTES.

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On Writ of Error to the Supreme Court of North Carolina.

BRIEF FOR PLAINTIFF IN ERROR.

I

Statement of the Case

This is a civil action begun in the Superior Court of Randolph County, North Carolina, by defendant in error, Maggie Gray, Admx. (hereinafter called the plaintiff), to recover damages for the death of her intestate, Kenneth L. Gray, which was alleged to have been caused by the negligence of the plaintiff in error, Southern Railway Company (hereinafter called the defendant).

Upon the trial there was a verdict in favor of the plaintiff for $7,500.00, which the court reduced to $4,500.00, without objection or exception on the part of the plaintiff, and judgment was rendered for $4,500.00 and costs (Printed Record, p. 22), which judgment was affirmed by the Supreme Court of North Carolina (for opinion see 167 N. C., 433; Printed Record, p. 60).

The case is brought here by the defendant, claiming that said judgment is inconsistent with the provisions of the act of Congress entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22, 1908, amended by the Act of April 5, 1910, enacted in pursuance of article I, section 8, clause 3, of the Constitution of the United States, and that said judgment deprives the defendant of rights, privileges, and immunities to which it is entitled under said article of the Constitution and the provisions of said act.

The material facts disclosed by the evidence are as follows:

On the evening of August 29, 1912, between 8 and 9 o'clock, Gray was called for duty and was assigned as brakeman on extra freight train running between Spencer, North Carolina, and Monroe, Virginia. The train left Spencer about 9:45 p. m.; it stalled on White Oak Mountain, three or three and one-half miles south of Dry Fork, Virginia, between 4 and 5 o'clock a. m. The train was cut in two, and Gray was sent with the front portion of the train to act as flagman (Printed Record, p. 28). The engineer carried the front portion of the train to Dry Fork and put the cars on the siding.

Gray was told by the engineer that train No. 37 was due by Chatham, Virginia, in about ten minutes, and he was directed to go up the track and flag this train. He had a red lantern, a white lantern, a fusee and three torpedoes. The freight engine then went back to White Oak Mountain for the rear portion of the train (Printed Record, p. 30). It was Gray's duty to go up the track eighteen telegraph poles, place one torpedo on the engineer's side, then go nine telegraph poles further, place two torpedoes ten yards apart on the engineer's side, and then return to the point where he had placed one torpedo and wait with his lanterns until the train arrived (Printed Record, p. 27). Gray did not place any torpedoes on the track, but he went up the track about three-quarters of a mile, placed his white lantern on the end of a tie, his red lantern on the rail, and lay down with his head on the end of another tie, with his body outside of the rail, and went to sleep. While in this position, he was struck on the head by the step on the right hand side of the tender of train No. 37, southbound, and was killed instantly (Printed Record, p. 35.)

Approaching the point of accident from the north, the railway track first curves to the right, through a deep cut, the embankments of which are about twenty feet high. At a point 580 feet north of the point of accident, the track straightens out and is straight for a distance of 363 feet, then there is a slight curve to the left 217 feet to the point of accident. (Printed Record, p. 41). There is a heavy descending grade for a distance of two and one-quarter miles, extending

from the top of Banister Hill to a point south of the point of accident (Printed Record, p. 33).

Train No. 37, a fast passenger train, was composed of an engine, tender, three mail cars, a club car, and six Pullman cars, the Pullman sleeping cars being made entirely of steel, and the rest of the cars had steel frames. (Printed Record, p. 31). The train was equipped with an electric headlight which was burning and in good condition. Approaching the point of accident on the morning of the 30th of August, No. 37 was four minutes late and was running between 55 and 60 miles an hour. Just before rounding the curve in the cut the engineer had blown the station blow for Dry Fork station. The engineer was in his seat, keeping a lookout ahead. When he emerged from the cut, and while rounding the right hand curve, he saw the lanterns sitting on the track ahead of him. He recognized it as a flagman's signal and answered the signal with two blasts of the whistle. About the time he had finished answering the signal, he reached the point where the track straightens, his headlight fell upon the track in front of him, and he saw an object lying beside the track that he thought was a man. He was then about 500 feet from the point of the accident. He immediately applied his brakes in emergency, shut off his engine and stopped his train as quickly as he could. His train ran about 1,500 feet beyond the point of accident before stopping. When the train stopped it was 5.14 a. m. There was not sufficient light at that time to see any considerable distance without the aid of artificial light (Printed Record, p. 33).

Plaintiff introduced two witnesses who testified that they had measured the distance from the point of accident north to the farthest point at which the point of accident could be seen and found it to be 38 rail lengths, or 1,254 feet (Printed Record, pp. 24-25). There were two curves in the track between these points. The measurements were made in broad daylight a year and a half after the accident (Printed Record, p. 25).

Just a few minutes before train No. 37 arrived, the freight engine had returned to Dry Fork with the rear portion of the train and had blown five long blasts of the whistle, the usual signal given for the purpose of calling in the flagman (Printed Record, p. 28).

II

Assignment of Errors Relied On

5. The Supreme Court of North Carolina erred in affirming the action of the trial court in denying the plaintiff in error's motion at the close of the defendant in error's evidence to dismiss the action as of nonsuit.

7. The Supreme Court of North Carolina erred in affirming the action of the trial court in refusing to allow the plaintiff in error's motion renewed at the close of all the evidence for judgment as of nonsuit.

8. The Supreme Court of North Carolina erred in affirming the action of the trial court in refusing to charge the jury, as requested by the plaintiff in error, that upon all the evidence they should answer the first issue "No."

9. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

> "When the defendant knows, or by the exercise of ordinary care, ought to know of the defendant's danger, and it is obvious that he cannot extract himself from it, and the defendant fails to do something which it has power to do to avoid the injury; or when the plaintiff is in some position of danger from a threatened contact with some agency under the control of the defendant when the plaintiff cannot and the defendant can prevent the injury, the plaintiff must show that at the same time in view of the entire situation, including the negligence of her intestate, the defendant was thereafter culpably negligent and that such negligence was the latest in succession of causes."

10. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

> "It is the duty of an engineer in charge of a moving train to exercise ordinary and reasonable care; that is, such care as a prudent man would exercise under the same or similar circumstances, to keep a vigilant lookout, to use such care to discover persons or objects upon or near the track in front of the advancing train, and to use such care in giving the proper signals or warning of the approaching train."

11. The Supreme Court of North Carolina erred in

affirming the action of the trial court in charging the jury as follows:

> "If he sees, or, by the exercise of ordinary and reasonable care, can see, a person on the track in an apparently helpless condition or in such condition so near the track that injury or death to such person may reasonably be apprehended or anticipated by the impact of the train, it is then his duty to use every available means in his power, reasonably consistent with the safety of the train and passengers, to prevent the injury."

12. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

> "Did he see, or could he, by keeping a vigilant lookout, in the exercise of reasonable care, have seen the intestate in a perilous situation on or near the track in time to prevent the injury and death?"

13. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

> "Could the engineer then have seen the intestate by the exercise of ordinary care, or did he in fact see him in time to avert the injury, and was the intestate at that time in a helpless condition or an apparently perilous situation?"

14. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

> "The plaintiff contends that the engineer, by the exercise of reasonable care, could have seen, if in fact he did not see, the intestate in time to have stopped the train and averted the injury, by the use of ordinary and reasonable care."

15. The Supreme Court of North Carolina erred in affirming the action of the trial court in charging the jury as follows:

> "If you find from the evidence, and by its greater weight, that the plaintiff's intestate was asleep on or near the track, and was in a position of peril by reason of threatened impact with the train and apparently insensible of danger, and that the engineer in charge of the approaching train saw or by the exercise of ordinary care, could have seen the perilous situation and could have averted the injury by any available means in his power reasonably consistent with the safety of the train and the passengers, and failed to do so, you will then find that the de fendant was negligent."

III

ARGUMENT

The assignments of error may be grouped as follows: Assignments five, seven and eight charge that the Supreme Court of North Carolina erred in affirming the acton of the trial court in denying defendant's motions for nonsuit or directed verdict. Assignments nine to fifteen, inclusive, charge reversible error on the

part of the North Carolina courts in that defendant's duty to plaintiff's intestate was measured by the North Carolina law, when the proper law to be applied was the Federal law.

We arrange our argument according to these two groups, discussing the second group first.

A

In Determining What Constitutes "Negligence" Under the Federal Employers' Liability Act, Recourse Must be Had to the Common Law as Interpreted by the Federal Courts.

The cause of action was predicated entirely upon the Federal Act, which supersedes all state law governing the same field, although the latter might have given to plaintiff a cause of action in the absence of the Federal Act. The Federal Act is exclusive, self-sufficient, supreme, and cannot be pieced out or detracted from by any state law.

> Second Employers' Liability Cases (*Mondon v. New York, N. H. & H. R. Co.*), 223 U. S., 1; 156 L. ed., 327.
>
> *Michigan Central R. Co. v. Vreeland*, 227 U. S., 59; 57 L. ed., 417.

The common and statutory laws are here on a parity. "Both are rules of conduct proceeding from the supreme power of the state. That one is unwritten and the other written can make no difference in their validity or effect. The common law did not become

a part of the laws of the states of its own vigor. It has been adopted by constitutional provision, by statute or decision, and, we may say in passing, is not the same in all particulars in all the states. But however adopted, it expresses the policy of the state for the time being only, and is subject to change by the power that adopted it."

> *Western Union Telegraph Co. v. Commercial Co.*, 218 U. S., 416.

The Federal Employers' Liability Act, under which this action was brought, gives a right of action for injury or death resulting in whole or in part from the "negligence" of the employing carrier. The Act uses the word "negligence" without defining it.

It is a well settled principle that "In the construction of the laws of Congress, the rules of the common law furnish the true guide."

> *Rice v. Railroad Co.*, 66 U. S., at page 374.
> *U. S. v. Sanges*, 144 U. S., at page 311.
> *Charles River Bridge v. Warren Bridge*, 11 Peters, 420.
> *Standard Oil Case*, 221 U. S., 1.
> *American Tobacco Co. Case*, 221 U. S., 106.

What does this mean? Does it mean the rules of the common law as determined by the courts of the various states or the common law as interpreted by the Federal courts?

On principle, there would seem to be no question but that in an action under the Federal Act, though brought in a state court, the existence of "negligence"

should be determined by the common law rules as laid down by the Federal courts. The purpose of Congress in passing a general law to regulate the responsibility of interstate common carriers by railroad to their employees engaged in carrying on commerce between the states, must necessarily have been to establish one general uniform law. To allow a state court to apply its own interpretation of the common law which is not in harmony with the Federal rule would be to defeat the very purpose of the Act, and liability would be made to depend upon what forum the plaintiff selected in which to bring his suit.

It is now well settled that this court will review and decide those questions which "in their essence involve the existence of the right in the plaintiff to recover under the Federal Statute to which his recourse by the pleadings was exclusively confined, or the converse; that is to say, the right of the defendant to be shielded from responsibility under that statute because, when properly applied, no liability on his part from the statute would result."

Seaboard A. L. R. Co. v. Padget, 236 U. S. 668, 59 L. ed., 777.
S. Louis, I. M. & S. R. Co., v. Taylor, 210 U. S. 281, 52 L. ed. 1061.
Seaboard A. L. R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171.

Expressed in another way, "Where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly

excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

> *St. Louis, I. M. & S. R. Co., v. McWhirter*, 229 U. S. 265, 57 L. ed., 1179.
> *Central Vermont R. Co. v. White*, 238 U. S. 507, 59 L. ed., 1433.

In determining whether there was "evidence tending to show liability under the Federal law," to what law will this court look? It is unthinkable that the Supreme Court of the United States, with a long line of its own decisions construing the common law applicable, will abandon its own views and seek out those of the court of last resort of the state from which the case comes and by them determine whether the case should be affirmed or reversed. Such a course would tend to confusion and would render impossible the uniform application of the Federal Act throughout the country. Yet this must happen if "negligence" is to be determined by the common law as interpreted by the state courts.

In considering this question the language of Mr. Justice Moody in the Taylor case, *supra*, is significant:

> "In no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the states of the Union."

In the case of Seaboard Air Line R. Co., v. Horton, 233 U. S., 492, the state court instructed the jury that an absolute duty rested upon the carrier to provide a reasonably safe place for the plaintiff to work and to

furnish him with reasonably safe appliances with which to do his work, and that a failure to comply with this duty was *ipso facto* negligence. This court held that Congress manifestly intended to predicate the right to recover in each case upon the existence of negligence, and announced the true rule to be that an employer is not a guarantor of the safety of the place of work or of machinery and appliances, but that the extent of its duty to its employees is to see that ordinary care and prudence was exercised to the end that the place in which the work is to be performed and the tools and appliances may be safe.

In the case of Central Vermont R. Co. v. White, *supra*, the Supreme Court of Vermont declined to follow its own rule that under the common law the absence of contributory negligence must be affirmatively shown by the plaintiff, and applied the decisions of the Federal courts holding that the existence of contributory negligence is a matter of defense to be proved by the defendant. This court upheld the action of the Vermont Supreme Court in this regard, using this language:

> "But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in states which hold that the burden is on the plaintiff. Washington & G. R. Co. v. Gladmon, 15 Wall., 401 (1), 407, 408, 21 L ed. 114-116; Hough v. Texas & P. R. Co., 100 U. S. 225, 25 L. ed. 617; Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551 (4), 557, 35 L. ed. 270, 272, 11 Sup.

> Ct. Rep., 653; Washington & G. R. Co. v. Harmon (Washington & G. R. Co. v. Tobriner) 147 U. S. 581, 37 L. ed. 288, 13 Sup. Ct. Rep. 557; Hemingway v. Illinois C. R. Co., 52 C. C. A., 477, 114 Fed., 843. *Congress, in passing the Federal employers' liability act, evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts.*" (Italics ours).

Here is an express declaration that when Congress used the phrase "contributory negligence," it intended to incorporate into it the prior Federal decisions as to its common law significance, and thus to require that they be followed by the state courts in administering the law. If Congress used "contributory negligence" in the light of the prior Federal decisions relating thereto, it follows necessarily that it also used the term "negligence" as construed, defined and applied by the Federal courts prior to the enactment of the statute.

If so, the state courts must follow all of the decisions of the Federal courts on the law of negligence made prior to the enactment of the Employers' Liability Act, inasmuch as Congress having legislated with reference thereto, they are in effect a part of the statute.

On April 3, 1916, this Court re-affirmed and followed the principle of the case of Central Vermont Company v. White, and other cases cited, *supra*. This was the case of Southern Express Company v. Byers, where a suit was brought against an Express Company for mental anguish alone on account of failure to deliver a certain shipment. There was no claim of other injury to person or property. The rule of the Federal Courts by a long line of decisions, denied a recovery

in a case of this kind, while the rule of the North Carolina courts, from which state the case came to the Supreme Court of the United States, allowed a recovery, where there was mental anguish suffered, though unaccompanied by any other injury to person or property. This Court reversed the Supreme Court of North Carolina and followed its own rule upon the subject.

Coming now to an examination of the record we find that the Court instructed the jury (and the Supreme Court of North Carolina affirmed the action of the trial court in so doing) that if the engineer in charge of the approaching train saw, or by the exercise of ordinary care, *could have seen* the perilous situation of the intestate, and could have averted the injury by any available means in his power, reasonably consistent with the safety of the train and the passengers, and failed to do so, then they could find that the defendant was negligent (Printed Record, pp. 48-53). This same principle was reiterated several times in the charge, the court using such terms as: "When the defendant knows, or by the exercise of ordinary care *ought to know of plaintiff's danger*"; "If he sees or by the exercise of ordinary care *could see* a person on the track"; "Did he see, or *could he, by keeping a vigilant lookout, in the exercise of reasonable care, have seen the intestate?*" *"Could the engineer then have seen the intestate by the exercise of ordinary care?"*

The effect of these instructions was to fix the duty upon the defendant to keep a vigilant lookout to discover plaintiff's intestate in his position of peril, and to charge the defendant with negligence, upon its failure

to keep such lookout, and in the exercise of reasonable care, discover the intestate. The instructions properly state the North Carolina law. The Federal courts, however, do not charge the defendant with this duty. Under the law as applied by the Federal courts, the defendant is liable if it could have avoided the injury by the exercise of ordinary care, *only after discovering the perilous situation.*

Inland and Seaboard Coasting Co. v. Tolson, 139 U. S. 551, 35 L. ed., 270.
Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed., 485.
Baltimore & Ohio R. Co. v. Hellenthal, 88 Fed., 116.
Iowa Cent. Ry. Co. v. Walker, 203 Fed., 685.
Hart v. Northern Pac. Ry. Co., 196 Fed., 180.
Atchison, T. & S. F. Ry. Co. v. Taylor, 196 Fed., 878.
Newport News & M. V. Co. v. Howe, 52 Fed., 362.
Note in 55 L. R. A., at page 424.
New York, N. H. & H. R. Co. v. Kelly, 93 Fed., 745.
Little Rock R. & E. Co. v. Billings, 173 Fed., 903.

In Newport News & M. V. Co. v. Howe, *supra.*, the plaintiff was a brakeman on a freight train, the train parted and the engine with forward portion of the train ran some distance ahead before the accident was discovered. The conductor on the rear portion of the train sent Howe ahead with a lantern to signal the engine, and to give the engineer information as to the whereabouts of the rear cars. Howe went for-

ward several hundred yards, sat down on the end of a tie, put his light down near him, and went to sleep with his arm thrown over the rail. The engineer, after running about five miles, discovered the parting, and started back with his engine and tender to take up the rest of the train. The fireman testified that, when within a distance of between 100 and 200 feet from the point where Howe lay, he saw the reflection of the light from Howe's lamp. He called to the engineer: "Look out, there they are," meaning the rear portion of the train. He looked again and saw on the other side of the track an object which he took to be the brakeman waiting to step on the engine. He crossed to the engineer's side and then saw the prostrate man only 10 or 15 feet from the approaching engine. He signalled the engineer, who applied the brakes, but was unable to stop before the wheels had passed over Howe's arm and cut it off. A witness, McGuire, testified that the engineer did not look out of the cab window, and that if he looked out he could have seen Howe and could have stopped the engine in time to avoid the accident. The rules of the company required the engineer, under these conditions, to signal his return by blowing his whistle at certain intervals, and not to run at a higher speed than four miles per hour. Both of these rules were being violated.

Judge Taft, writing the opinion, says:

> "While an engineer who fails to keep a sharp lookout upon the track is wanting in due care to passengers and lawful travellers, because of the probability of danger to each from such failure, such conduct is not a want of due care with respect to a man asleep on the track, be-

> cause of the presumption on which the engineer has a right to rely that no one would be so grossly negligent in courting death.
>
> "As applied to a case like the present, therefore, we believe the rule relied on by counsel of plaintiff below should be construed to mean that the negligence of the plaintiff will be no defense, if the defendant, *after he knew the peril of the plaintiff*, did not use due care to avoid it."

This case cites Coasting Co. v. Tolson, 139 U. S., 551, and referring to that case, Judge Taft says: "This would seem to show that, in the opinion of the Supreme Court, knowledge of plaintiff's peril was required to make the rule applicable."

In Little Rock R. & E. Co. v. Billings, *supra.*, the court, composed of Justices Sanborn, Pollock and Van Devanter, said as follows:

> "As deduced from the foregoing authorities, and many others that might be cited, this qualification may be stated as follows: A, who by his own negligent act or conduct has placed himself in a position of imminent peril, of which he is either unconscious or from which he is unable to extricate himself, if conscious, may not be carelessly, recklessly, or wantonly injured by B, who *after he has discovered and knows the helpless and perilous condition of A*, has it within his power to avoid doing him an injury by the exercise of reasonable care and diligence in the use of such instrumentalities as he can command; and the failure to exercise such reasonable care and diligence on the part of B, under such circumstances, will constitute actionable negligence, rendering him liable in damages to A, notwithstanding the prior negli-

> gent act of A, in placing himself in position to receive the injury." (Italics ours.)

The rule above stated is the law applicable to the present case, and it is submitted that it was plain error for the Supreme Court of North Carolina to affirm the action of the trial court in charging the jury that if the engineer of the approaching train saw, or by the exercise of reasonable care, *could have seen* the perilous situation and could have averted the injury by any available means in his power, reasonably consistent with the safety of the train and the passengers, and failed to do so, then they should find that the defendant was negligent.

B

Where No Evidence of Negligence Federal Right is Denied and Reviewable in Supreme Court.

We come now to a discussion of the first group of assignments of error—five, seven, and eight, which charge that the Supreme Court of North Carolina erred in affirming the action of the trial court in denying defendant's motions for nonsuit or directed verdict. Assignments five and seven relate to the refusal of the court to dismiss the case upon motion for nonsuit, while assignment eight relates to the refusal of the court to charge the jury, as requested, that upon all the evidence they should answer the first issue "No."

At the close of plaintiff's evidence, the defendant moved for a nonsuit, according to the State practice (Printed Record, p. 27). The court reserved the motion and at the close of all the evidence the defendant renewed its motion for nonsuit, which motion the

court overruled and submitted the case to the jury (Printed Record, p. 45). In apt time, and in writing, the defendant prayed the court to instruct the jury that upon all the evidence they should answer the first issue "No," which instruction the Court declined to give (Printed Record, p. 45). Proper exceptions were noted to the action of the trial court in overruling defendant's motions for nonsuit and in declining its request that the jury be instructed to answer the first issue "No" (Printed Record, pp. 27 and 45), and, upon error to the Supreme Court of North Carolina, and his judgment was affirmed (Printed Record, p. 60 *et seq*). The case is now here for decision whether there was sufficient evidence of negligence on the part of the defendant to justify the action of the State Court in holding that the motions for nonsuit or directed verdict should not have been granted.

It is now settled that where, in an action under the Federal Act, the claim is made and denied that there was no evidence tending to show liability, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law.

Seaboard A. L. R. Co. v. Padgett, 236 U. S., 668, 59 L. ed., 777.
St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed., 1061.
Seaboard A. L. R. Co. v. Duvall, 225 U. S. 477, 56 L. ed., 1171.
St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed., 1179.
Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed., 1433.

In the case of Seaboard A. L. Ry. v. Padgett, *supra.*, the negligence alleged was an uncovered pit in the roundhouse of the defendant and also insufficent lights. In delivering the opinion of the court, Mr. Chief Justice White said:

> "If our jurisdiction attaches, it can only be because the right to recover was based upon the act of Congress commonly known as the employers' liability act, it having been averred that the deceased was an employee of the company, actually engaged in interstate commerce. But, as pointed out in St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 275, 57 L. ed., 1179, 1185, 33 Sup. Ct. Rep., 858, although the cause of action relied upon was based upon the Federal statute, nevertheless, 'as it comes here from a state court, our power to review is controlled by Rev. Stat. § 709 [§ 237, Judicial Code (36 Stat. at L., 1156, chap. 231, Comp. Stat., 1913, §1214)], and we may therefore not consider merely incidental questions not Federal in character; that is, which do not in their essence involve the existence of the right in the plaintiff to recover under the Federal statute to which his recourse by the pleadings was exclusively confined, or the converse; that is to say, the right of the defendant to be shielded from responsibility under that statute because, when properly applied, no liability on his part from the statute would result.'"

After disposing of the assignment of error relating to assumption of risk the Chief Justice further says:

> "While this disposes of the two assignments which are directly and specifically concerned

> with the interpretation of the statute, nevertheless the remaining seven also raise questions of law under the statute, since they all, in one form or another, rest upon the contention that error was committed by the trial court in not taking the case from the jury and instructing a verdict for the defendant upon the assumption that there was no evidence sufficient to justify the submission of the case to the jury for its consideration."

The reason for this practice is well stated by Mr. Justice Moody in the case of St. Louis, etc., Ry. Co., v. Taylor, *supra;*

> "Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence may lead to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction is clearly warranted by the Constitution and so explicitly conferred by the Act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all the States of the Union."

Or, as was stated in a slightly different way by Mr.

Chief Justice White in the case of St. Louis, etc., R. C., v. McWhirter, 229 U. S., 265:

> "While it is true, as we have said, that, coming from a state court, the power to review is controlled by Rev. Stat. Sec., 709, yet where, in a controversy of a purely Federal character, the claim is made and denied that there was no evidence tending to show liability under the Federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the Federal law."

C

Application and Analysis of the Evidence.

1. Plaintiff's Intestate's Negligence Conceded

In the presentation of their case, plaintiff's attorneys made no attempt to exculpate the plaintiff's intestate from negligence. Indeed it was conceded in both the original declaration (Printed Record, p. 11), and in the amended declaration (Printed Record, p. 16), that the plaintiff's intestate was grossly and wilfully negligent, in the following language:

> "The intestate of the plaintiff was sent forward about three-quarters of a mile to signal a passenger train of the defendant, coming south; that the intestate of the plaintiff, when he had gotten about three-quarters of a mile north of Dry Fork, for some reason—loss of sleep, or from some other cause unknown to the plaintiff—laid down by the side of the track

> of the defendant with his head on the end of the crossties and went to sleep."

This allegation is undisputed, and, in corroboration thereof, defendant's witness, A. F. Newcomb, the conductor and superior officer of the plaintiff's intestate, testified as follows:

> "I instructed the front brakeman, Gray, * * * to stay at Dry Fork and hold all trains south until I arrived with the rear end of my train."

The basis of the plaintiff's suit was that, notwithstanding his intestate's negligence, the defendant Railway Company was likewise guilty of negligence, and, under the comparative negligence doctrine, the court should apportion the negligence and award him damages for that part of the negligence in the case for which the defendant was responsible.

An analysis of the evidence in the case will demonstrate, beyond fear of successful contradiction, that there was not the slightest want of care on the part of the defendant, and that the plaintiff did not contribute as much as one jot or tittle of negligence which resulted in the unfortunate fatality for which this suit was brought.

2. Plaintiff's Intestate Did Not Comply With the Rules

The Rules of the defendant required that plaintiff's intestate should go back eighteen telegraph poles, or about one thousand yards, place one torpedo on en-

gineer's side, then go nine telegraph poles farther, place two torpedoes on the engineer's side, and then return to the place where he had put the one torpedo and wait, with his lanterns, until the train arrived. He did not place any torpedoes on the track, as was testified to, without contradiction, by the engineer of the train which killed him (Printed Record, p. 34), but, instead thereof, set his lanterns upon the track and laid down and went to sleep, using the end of the crosstie for a pillow (Printed Record, pp. 11, 16, 34).

3. It Was Dark When the Accident Occurred

The accident happened at 5:14 a. m., August 30, 1912, according to the testimony of the conductor who looked at his watch immediately thereafter (Printed Record, p. 32):

> "The train stopped at 5:14. I have to keep a record and account for all delays, and the first thing I did was to look at my watch. I made a record of the time the train stopped that night."

The record is full of statements to the effect that it was too dark to see at that time without the aid of artificial light. The accident happened in a low and swampy country, and, in addition to this, it was foggy, On this point see the testimony of the following witnesses:

A. F. Newcomb, *Conductor,* testified:

> "Day was just beginning to break and the weather was a little foggy. From where I

was, on a straight line, I could see the White Oak trestle without the assistance of a light. I could see a very little distance. I saw the reflection of No. 37's head light when it was possibly a mile away. My head light was burning at that time. My lantern was also lighted and burning." (Printed Record, p. 29.)

A. R. HARRISON, *Engineer,* testified:

"It was about dark, it was a little foggy, and you could not see without a light." (Printed Record, p. 30.)

T. TERRY, *Flagman,* testified:

"It was not light, day had just started to break, I and the other members of the crew were still using our lanterns." (Printed Record, p. 31.)

C. M. HUGHES, *Conductor,* testified:

"I had my lantern, it was twilight, a little foggy, it is a low country and swampy. It was just beginning to get light, but you could not see distinctly without a light." (Printed Record, p. 32.)

R. E. HIPPERT, *Engineer,* testified:

"It was just about twilight. It was dark enough so a man could not see to do anything without a light around on the ground. I could not see any distance ahead of my engine without the head light. Day was just about breaking." (Printed Record, p. 34.)

H. H. KLINKSCALES, *Fireman,* testified:

"At the time we stopped there it was pretty

dark, the fog was thick, it was just beginning to leave the ground in the morning and very dark." (Printed Record, p. 40.)

4. Engineer Could Not and Did Not See Plaintiff's Intestate Until It Was Too Late.

The evidence in the case established the fact that the engineer could not see over five hundred feet ahead of him. The engine was equippd with an electric headlight, which the evidence showed was sufficient to indicate the presence of a man standing on the track, if not more than five hundred feet ahead of the engine.

A. R. Rowzie, *Locomotive Engineer*, testified:

"The focus or direct rays of your light are thrown straight ahead on your track to a distance of, I suppose, 500 feet. I do not mean you can distinguish an object that far. With the use of one of these electric headlights, I would say a man standing on a track could be distinguished, on a clear night, a distance of 400 to 450 feet. You can see objects on the track further than that. It is easier to see a man standing up on the track than it is lying down." (Printed Record, p. 43.)

R. E. Hippert, *Engineer*, testified:

"Coming south around the curve from the first point that you could see the point where he was lying, in the day time, was about 1,000 feet, but from that point 1,000 feet away, my headlight on the morning of August 30, 1912, was not throwing any light to the point where he was lying. I don't remember now the exact

> figures, but it was in the neighborhood of 400 feet I think from the point of the straight line immediately north of where the flagman was lying when my light for the first time fell on the place where Gray was lying." (Printed Record, p. 35.)

There was only one eyewitness to this accident and that was the engineer of the train which struck the plaintiff's intestate. His testimony is uncontradicted and is full and explicit that he discovered the presence of the plaintiff upon the track the first moment it was possible for him to do so, and that immediately he did everything in his power to avert the accident, but without success. We quote from his testimony as follows:

> "As soon as my engine got around the curve in the cut, so I could see beyond the cut, I saw two lanterns, a white lantern sitting on the end of the tie and a red lantern on the rail. I hadn't taken my hand off the whistle cord after blowing the station blow. I immediately answered the flagman's signal by two short blasts of the whstle. About the time I answered the flagman's signal, the rays of my head light came around and struck this little straight piece of track. About the time I had finished answering the flagman's signal I had run within 400 or 500 feet of the flagman's lantern. An electric headlight don't revolve, it is straight all the time. As the rays of the headlight came around the curve and struck the straight line, I saw something lying by the side of the track. I was within 400 or 500 feet from it. I hadn't shut the steam off my engine. I was working my engine light down that hill, up to that point, when I saw this object lying beside the track

I was running between 55 and 60 miles an hour. I took my hand off the whistle cord and reached for and grabbed the brake valve handle and threw the brakes in emergency, and then reached up and shut the engine off. * * * There was nothing else I could have done after I saw the object lying there to stop my train before I got to him."

5. Accident Happened Where Track Passed Through Cuts and Around Curves

The Record shows that the plaintiff's intestate was lying on the outside of a left-hand curve going south. Approaching the point where he was lying from the north, the railway first curves to the right through a deep cut, the embankment of which are from sixteen to twenty feet high. At a point five hundred and eighty feet north of where he was lying the track straightens and is straight for a distance of three hundred and sixty-three feet, then there is a slight curve to the left of two hundred and seventeen feet to the point of the accident. (Printed Record, pp. 40, 41 and 42).

The engineer testified clearly, intelligently and forcibly that the headlight was thrown straight out in front of the engine, and, in going around curves, the light would fall upon the track ahead of him for no appreciable distance; that, as soon as his engine straightened out on the tangent, he discovered the lantern; at that time he was about 500 feet away; that he immediaely blew his whistle and placed his engine in emergency (Printed Record, pp. 33 to 36).

He was operating a heavy train down grade at

about sixty miles an hour, and the testimony of the engineer, and other engineers familiar with that track and with trains of a similar character, was that such a train could not have been stopped, under any circumstances, in less than 1,500 to 2,000 feet. (Printed Record, pp. 36, 43, 44).

6. Plaintiff's Evidence Absolutely Insufficient to Establish Negligence

The evidence of the plaintiff that in the slightest squints at negligence occupies little more than one page of the printed record, and that on pages 24 and 25. It consists of the evidence of two witnesses who went to the scene of the accident and made certain observations in broad daylight, as to how far they could see the point of the accident from a point up the track from which direction the train was approaching that killed the plaintiff's intestate.

On this point the plaintiff's witness, J. R. Scruggs, testified that on the day of the accident he went on the ground and made measurements north from the point of the accident to where he could see, and found it to be 38 rail lengths. This observation was made about noon, according to his testimony. The witness was fair enough to admit, on cross-examination, as follows:

> "Immediately north of this place at which the blood was found there is a curve around an embankment."

The other witness, S. W. Jones, was taken by Mr. Scruggs on the ground more than a year and a half

after the accident, and made similar observations. We quote from his testimony:

> "It was more than a year and a half after the accident. That was the time that Mr. Scruggs measured the distance. The distance that I refer to was the distance between the position in which I stood and the place pointed out to me by Scruggs as the place at which he saw the blood. Between these two points there were two curves. The point that you could stand and look that distance was at the pont of one curve and this other place was at the point of the reverse curve. I measured from a point on the right hand curve to a point on the left hand curve, forming what I call a reverse curve. The distance that I measured covered a part of two curves."

The evidence of these two men, as above set forth, constitutes the entire case of the plaintiff, but it is earnestly insisted that it would not raise a *prima facie* case, even where the doctrine of *res ipsa loquitur* applies. The witnesses testified that the observations were made in broad daylight, and that between the point of the accident and the farthest point that they could see was a stretch of track approximately 1,254 feet long; that between these two points there were two curves, one of which was around an embankment. We believe, with the utmost confidence, that this court will say that this evidence is absolutely insufficient to support a finding of fact that the engineer did see, or even that he could have seen the plaintiff's intestate, which latter duty we assert, was not required of him, as has been fully pointed out in the first part of this brief.

D

Doctrine of Comparative Negligence Inapplicable

The Supreme Court of North Carolina held that the doctrine of comparative negligence applied to this case, and under its provisions there should be a recovery on the part of the plaintiff.

Chief Justice Clark, in delivering the opinion of the court, said:

> "Excs. 9, 10, 11, 12, 13, 14, and 15 are to the charge of the court and rest upon the idea that the defendant owed the intestate no duty whatever until the peril of the deceased was discovered by the engineer. This would destroy the entire doctrine of 'the last clear chance' in cases of negligence. This is not the intent of the 'Employers' Liability' statute which is in the interest of the party injured, by making contributory negligence, when it exists concurrently with negligence on the part of the defendant, not a complete bar to recovery, as heretofore, but only a matter in abatement in proportion to the comparatve negligence of the party injured."

It is earnestly urged that, in a case of this kind, where an employe is killed by reason of his gross neglect and wilful violation of the rules which were enacted for both his own safety and that of the railway company's passengers and property, there is no room for the application of the doctrine of comparative negligence. In support of this contention the attention of the court is directed to the language of Judge Whittle,

in rendering the opinion in the case of Southern Railway Company v. Johnson's Administratrix, 111 Va. 499, 69 S. E., 323:

> "The imperative necessity for adherence to the policy of enforcing strict observance of the rules in question is obvious. Indeed, failure of duty either by railroad companies or their employes in a matter so essential to the protection of life and property would be little short of criminal. And the courts cannot be too careful to avoid impairing the usefulness of such rules by engrafting upon them unnecessary limitations by way of exception or qualification. In Elmgren v. Chicago, etc., R. Co., 102 Minn. 41, 112 N. W., 1067, 12 L. R. A. (N. S.), 754, the court says: 'It is of the utmost importance, as a matter of public policy, that the strict observance of these rules should be insisted upon by railroad companies, and, whenever opportunity occurs, by the courts. The appalling fatalities to human life and the great destruction of property consequent upon mismanagement and neglect of signal devices is in large measure avoidable. However much sympathy may be naturally felt for overworked employes, a rule of law which would ignore in any degree the safety of the public would be little less than calamitous. If a clear case of violation of the solemn duty on the part of an employe to regard signals be shown, he must be held to be in no position, in the absence of a satisfactory explanation, to recover damages in a measure occasioned by his own fault.' "

This was a case where the plaintiff's intestate had failed to comply with a rule of the company which was

enacted for both his safety and that of the company's passengers and property, the result of which was a collision.

Numerous cases might be called to the attention of this court, but it is believed that it will be only necessary to quote from the opinion of Mr. Justice McKenna, in the case of Great Northern Railway vs. Wiles' Administrator, which opinion was handed down on March 20th of this year. This was a case practically identical on principle with the case at bar. Plaintiff's intestate was similarly employed on a freight train, as was Gray. His train was unexpectedly stopped at an unusual place, as was the fact in the instant case. Wiles failed to go back and flag the train which collided with his train and killed him, while Gray, although he went back, did nothing else, but, instead thereof, in gross and wilful violation of his duty, laid down near the track and went to sleep. The doctrine of comparative negligence was urged, and it was contended that, although Wiles might have been negligent, still, under the Federal Employers' Liability Act, his negligence would only diminish the amount of the recovery in case the defendant was negligent. But Mr. Justice McKenna disposed of this contention in the following language:

> "The case at bar is not solved by the doctrine. There is no justification for a comparison of negligences or the apportioning of their effect. The pulling out of the drawbar produced a condition which demanded an instant performance of duty by Wiles, a duty not only to himself but to others. The rules of the company were de-

vised for such condition and provided for its emergency. Wiles knew them and he was prompted to the performance of the duty they enjoined (the circumstances would seem to have needed no prompting) by signals from the engineer when the train stopped. He disregarded both. His fate gives pause to blame, but we cannot help pointing out that the tragedy of the collision might have been appalling. He brought death to himself and to the conductor of his train. His neglect might have extended the catastrophe to the destruction of passengers in the colliding train. How imperative his duty was is manifest. To excuse its neglect in any way would cast immeasurable liability upon the railroads and, what is of greater concern, remove security from the lives of those who travel upon them; and therefore all who are concerned with their operation, however high or low in function, should have a full and anxious sense of responsibility.

In the present case there was nothing to extenuate Wiles' negligence; there was nothing to confuse his judgment or cause hesitation. His duty was as clear as its performance was easy. He knew the danger of the situation and that it was imminent; to avert it he had only to descend from his train, run back a short distance, and give the signals that the rules directed."

IV

SUMMARY

Since, under the law applied by the Federal courts, the defendant owed no duty to plaintiff's intes-

tate until his peril was discovered, the motion for nonsuit should have been allowed, or the instruction given. It was uncontradicted that approaching the point of accident, the track is on a declining grade, and that the train was running from 55 to 60 miles an hour when the engineer saw an object that he took to be a man. The evidence was uncontradicted that the engineer immediately applied his brakes in emergency, shut off his engine, and did all in his power to stop his train, but that, on account of the grade, coupled with the weight and speed of the train, he was unable to stop until he had run 1,500 feet past the point of the accident.

There was no allegation of negligence, nor evidence to show any negligence, either before or after the discovery of the plaintiff's intestate.

We, therefore, respectfully urge that upon a full and fair consideration of the whole case the judgment of the Supreme Court of North Carolina should be reversed.

Respectfully submitted,

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JAMES D. MAHER
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 355.

SOUTHERN RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MAGGIE GRAY, ADMINISTRATRIX OF KENNETH L. GRAY, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH CAROLINA.

BRIEF FOR DEFENDANT IN ERROR.

JOHN A. BARRINGER,
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(24,567)

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I.

Statement of the Case.

This is a civil action brought against the plaintiff in error (hereafter called the defendant) for killing the intestate of the defendant in error (hereafter called the plaintiff) by the defendant on the 30th day of August, 1912, near Dry Fork,

in the State of Virginia, under the Employers' Liability Act, chapter 149, 35 Statutes at Large, page 65, as amended by chapter 143, 36 Statutes at Large, page 291.

The complaint alleges that the passenger train of the defendant killed the intestate of the plaintiff by the wrongful act of the defendant, in that, although the engineer or the fireman could easily have seen the intestate of the plaintiff lying in a helpless condition by the track of the defendant, same being straight a sufficient distance therefor, to have stopped the train or slackened its speed sufficiently to have prevented the killing of the intestate of the plaintiff, they ran the train onto the intestate of the plaintiff without ringing the bell and without blowing its whistle, and that the servants of the defendant did not keep a proper lookout on the track in front of the engine to have the train under control so that they could stop the engine in time to have prevented the wrongful killing of the intestate of the plaintiff or slacken its speed, and that the servants of the defendant did not see the intestate of the plaintiff, as they could have done by the exercise of ordinary care and as it was their duty to do, until the train was so near the prostrate form of the intestate of the plaintiff that the defendant could not stop its train in time to save the life of the intestate of the plaintiff; that the defendant had the last clear chance to prevent the killing of the intestate of the plaintiff, which it failed to exercise by ordinary care.

The evidence showed the following facts: That the intestate of the plaintiff was killed at 5:14 in the morning of the 30th of August (pages 32 and 34), and the evidence is that the sun rose twenty minutes thereafter, at 5.34 (page 45). The defendant was running its train from Monroe south toward Dry Fork and had a bright electric headlight. Before lying down, the intestate had placed two lanterns on the track, one with a red light and one with a white light. The engineer on No. 37 admitted that he saw both

lanterns, and that he recognized them as a flagman's signal. and that they indicated danger (page 34).

According to the testimony of J. R. Scruggs (page 24) and the testimony of S. W. Jones (page 25), there was a clear, unobstructed view of a man standing on the track north of where the body of the intestate was lying for 38 rails, each 33 feet long, making 1,254 feet, and an engineer in a cab, being higher than a man standing on the ground, could have seen further, possibly two rails further, making 66 feet, which, added to 1,254 feet, would make 1,320 feet, a quarter of a mile. One of the witnesses further testified that the two curves in the road, referred to in the testimony of the witnesses for the defendant, made a slight reverse curve and did not obstruct the view down the track (pages 25 and 26), and the other witness testified that the measurement was made from the curve around an embankment to the place the intestate was killed.

The defendant's testimony showed that they had an unobstructed view for about 1,100 feet north of where the body of the intestate of the plaintiff was lying. The engineer of No. 37 himself testified that there was an unobstructed view of 1,000 feet (page 35).

The intestate of the plaintiff was awakened when the whistle was blown by the engineer of No. 37, and raised his body when his head was struck by an iron step that was on the outer side of the tender, two or three feet from the rail, hanging down a foot or more (pages 34 and 35).

Klinkscales, fireman on No. 37, testified in part: "I would say I was about 50 yards from the body when I first saw it. I stated in my deposition that Mr. Hippert said he saw him in about 15 or 20 yards, and knew it was a man lying there."

Hippert, engineer on No. 37, testified that he had sworn in his deposition, which had been previously taken, as follows: "I have been examined once before in this case. When I was asked how far I saw this man on the track, I said about fifty yards off, when I saw his light and distinguished

it was a flag. I said just what is on that paper as a supposition of the distance" (page 37). He said that he saw the man lying there when he was 350 feet away (page 38), and he said: "I suppose if I had blown the whistle far enough up the track to have awakened him, he would have gotten up very likely without striking his head on the step" (page 37). The court's attention is especially called to the questions and answers on page 37 of the record. And on page 38 the following: "Then when you turned that curve you ought to have seen this red light sitting on the rail? Ans. Yes, sir, I did. Q. What is the red light for? A. To flag a train. Q. Then you knew that that red light was flagging your train? A. Sure, I did. Q. As you said on your examination, you knew there was a flagman there? A. Yes, the flagman was supposed to be there." This witness further testified (page 39): "I was possibly one-half or a third of the distance of the straight line before I saw the body. When I saw the flagman's signal he should have been standing on the end of a tie so I could see him with his lamps, holding his white lantern in his left hand and signalling with his red lantern across the track."

II.

ARGUMENT.

A.

Motions for Nonsuit and Directed Verdict.

On the facts in this case, and on any rule of law as to what constitutes negligence, the trial court properly refused to grant the motions for nonsuit and to direct a verdict for the defendant.

Upon a motion to nonsuit the court could not consider any of the defendant's testimony in its favor, but only that of the

plaintiff and such parts of the defendant's as tended to establish plaintiff's right to recover.

Winborne Guano Co. *vs.* Plymouth Mercantile Co., 168 N. C., 223.

When there is sufficient evidence, viewed in the light most favorable to the plaintiff to sustain a verdict in his favor, a motion of nonsuit will not be granted.

Hodges *vs.* Wilson, 165 N. C., 323.

Walters *vs.* Lumber Co., 165 N. C., 388.

On the testimony and the law applicable to the case the jury could have arrived at the following conclusions:

1. That there was an unobstructed view of more than 1,200 feet from the danger signals and the place the intestate was struck.

2. That the red and white lights were on the track. This was undisputed.

3. That it was the duty of the engineer to keep a lookout for danger signals.

> "When I saw the white lantern and the red lantern, it indicated a flagman, and that there was danger ahead of me. When I see a flag signal it is my duty to answer it by two short blasts of the whistle and then begin to stop the train" (testimony of the engineer of No. 37, page 34).

4. That the fact the train approached about 1,300 feet distant around a curve did not excuse the engineer from keeping a lookout down the track.

5. That the lights on the track could in fact be more easily seen when they were in the darkness and out of the

direct rays of the headlight as the train was entering the straight track from the curve.

6. That in the exercise of ordinary care the engineer could have seen the lights at a point more than 1,200 feet distant.

> "Q. Then when you turned that curve you ought to have seen this red light sitting on the rail? A. Yes, sir, I did" (page 38).

7. That the engineer should have blown his signal as soon as he saw the danger signals, or by the exercise of ordinary care could have seen them, which was when he was more than 1,200 feet distant.

8. That instead of bringing his train under control and trying to stop it as soon as he saw, or by the exercise of ordinary care could have seen, the lights the engineer waited until he saw the intestate lying beside the track.

> "At the time I saw the object lying beside the track I was running between 55 and 60 miles an hour" (page 34).

On cross-examination this witness was asked about his testimony on a previous examination and said:

> "When I was asked how far I saw this man on the track, I said about fifty yards off, when I saw his light and distinguished that it was a flag. I said just what is on that paper as a supposition of the distance. I hadn't measured it. When he asked me those questions, I never had taken any measurements at all and it was just a supposition on my part as to distances. I don't know whether it was fifty yards or one hundred yards, and I said about fifty yards, and that is how he got those questions" (page 37).

On this question of the sufficiency of the evidence it is respectfully urged that it was for the jury to determine upon all the testimony whether the engineer exercised ordinary or reasonable care in failing to keep such a lookout as would have enabled him to see the warning lights, and to bring his train under control earlier than he did. That question is nearly related to the point presented by the other assignments of error, as to the rule of negligence to be applied to the case under the instructions of the court, and the authorities are referred to in the discussion of that particular matter hereafter.

B.

Rule of Negligence Applicable.

Exceptions were taken to certain parts of the instructions to the jury on a contention by the defendant that the principle that a railroad company is fixed with a duty to a person on the track only after discovery of the peril is a rule of the United States courts and should have been applied by the State court in this case. In reply to this contention of the defendant it is respectfully urged, first, that such a principle has never, in any case, been declared and applied by this court; and, second, that it could not properly be applied to the facts in this case. On the facts herein the decisions of the United States Supreme Court and the State court are in harmony.

In Inland, &c., Coaling Co. *vs.* Tolson, 139 U. S., 551, the court, with respect to an instruction that contributory negligence will not defeat recovery "if it be shown that the defendant might, *by the exercise of reasonable care and prudence,* have avoided the consequences of the plaintiff's negligence," said:

> "The qualification of the general rule, as thus stated, is supported by decisions of high authority and was applicable to the case on trial."

In that case the plaintiff's foot was crushed by the negligent management of a steamboat. It was argued that there was no evidence that the defendant knew the peril of the plaintiff, but the court said:

> "The jury might well be of opinion that while there was some negligence on his part in standing where and as he did, yet that the officers of the boat knew just where and how he stood, and might have avoided injuring him *if they had used reasonable care* to prevent the steamboat from striking the wharf with unusual and unnecessary violence."

And so in the case at bar the defendant's employees were on notice by the danger signals that there was some danger ahead, and were at once put upon the exercise of reasonable care.

The same rule of care, on the last clear chance, was declared and applied in

Grand Trunk R. Co. *vs.* Ives, 144 U. S., 408.

On page 417 the court says:

> "There is no fixed standard in the law by which a court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent and what shall constitute ordinary care, under any and all circumstances. * * * What may be deemed ordinary care in one case may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case and then say whether the conduct of the parties in that case was such as would be expected of reasonable and prudent men under a similar state of affairs."

So that it would seem that the court cannot make an arbitrary rule, as is set forth in the plaintiff in error's brief, that

there is no obligation under any circumstances or at any time upon a railroad company to keep a proper lookout on its track and thus for the company to be entirely relieved of the care of a prudent man in running its trains. It must appear to the court that there may always be danger ahead on the railroad track to an oncoming train, as it is well known that the tracks are frequently obstructed, washouts take place, human beings may be in a helpless condition on the track and it cannot be, as it seems to the defendant in error, that human life is of such little consequence that it may be taken when by a proper lookout by the engineer of an oncoming train it might have been preserved.

The court says in the above case, on page 420, that the instruction given by the judge in the lower court was correct, to wit:

> "So if you find that the train hands kept no proper lookout and managed the train without due caution and reasonable care you will be authorized to infer negligence on the part of the company as one of the facts established in the case."

The court virtually says in the above case that, notwithstanding the negligence of the deceased, the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might by the exercise of reasonable care and prudence have avoided the consequence of the injured party's negligence.

Sullivan *vs.* N. Y., N. H. & H. R. Co., 28 N. E. Reports, 911, cited and approved in the above-entitled case.

It is the duty of the engineer and fireman to keep a proper lookout on the track.

Arrowood *vs.* R. R., 126 N. C., 629.

Smith *vs.* R. R., 114 N. C., 729.

And it is for the jury to say whether, under all the circumstances, the defendant's employees were negligent in failing to keep a proper lookout for the *warning lights* on the track, which would have put them on notice of some danger, with respect to which, whatever it might be, they must bring the train under immediate control.

Dellago *vs.* R. R., 165 N. C., 269.

It was for the jury to determine, under the circumstances, the distance in which the warning lights or body of the deceased could have been seen, as well as the distance within which the train could have been stopped.

Draper *vs.* R. R., 161 N. C., 307.
Davis *vs.* R. R., 136 N. C., 117.
Wright *vs.* R. R., 127 N. C., 225.
Henderson *vs.* R. R., 159 N. C., 581.
Holman *vs.* R. R., 159 N. C., 44.
Edge *vs.* R. R., 153 N. C., 212.
Powell *vs.* R. R., 125 N. C., 374.
Pickett *vs.* R. R., 117 N. C., 628.

In those jurisdictions, however, in which the doctrine of discovered peril is applied, a qualification is recognized, as where the defendant, by the exercise of reasonable care, might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected. To render the defendant liable it is not necessary that it could have contemplated, or even been able to anticipate, the particular consequences which ensued.

> "Where an act is negligent it is not necessary to render it the proximate cause that the person committing it could or might have foreseen the particular consequence or precise form of the injury, or the particular manner in which it occurred, if by the exer-

cise of reasonable care it might have been foreseen or anticipated that some injury might result."

Title Negligence, 29 Cyc., 495.

"In order, however, that a party may be liable in negligence, it is not necessary that he should have contemplated or even been able to anticipate the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected."

Title Negligence, 21 A. & E. Ency. of Law (2nd ed.), 487.

See Robinson *vs.* Mfg. Co., 165 N. C., 495.

Ward *vs.* North Carolina R. Co., 161 N. C., 179.

Hudson *vs.* Atlantic Coast Line R. Co., 142 N. C., 198.

Drum *vs.* Miller, 135 N. C., 204.

"But, furthermore, in a number of jurisdictions it is held that the plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was more immediately caused by the omission of the defendant, *after having such notice of the danger as would put a prudent man upon his guard*, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if, having sufficient notice to put a prudent man on the alert, he does not take such precautions as a prudent man would take under similar notice."

Shearman & Redfield on Negligence (5th ed.), sec. 99.

See also Thompson on Negligence, vol. 1, secs. 219 *et seq.*

"In some jurisdictions the principle of the doctrine of discovered peril "is extended to cases where the defendant might have discovered the peril by the exercise of reasonable care, or has neglected the most ordinary precaution in failing to do so, or where not knowing of the danger he has *sufficient notice to put a prudent man on the alert.*"

Title Negligence, 29 Cyc., 531.

See Klockenbrink *vs.* St. Louis, &c., R. Co., 81 Mo. App., 356.

Respectfully submitted,

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